UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§	Civil Action No. H-01-3624
	§	**(Consolidated)**
	§	
	§	CLASS ACTION
This Document Relates To:	§	
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,	§	
Plaintiffs,	§	
vs.	§	
ENRON CORP., et al.,	§	
Defendants.	§	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated,	§	
Plaintiffs,	§	
vs.	§	
KENNETH L. LAY, et al.,	§	
Defendants.	§	

LEAD PLAINTIFF'S REPLY MEMORANDUM IN RESPONSE TO VARIOUS DEFENDANTS' OPPOSITIONS TO CLASS CERTIFICATION

1854

TABLE OF CONTENTS

Page

Page

Page

Page

TABLE OF AUTHORITIES

Page

Page

Page

Page

Page

Page

Page

Page

Page

Page

Page

Page

Page

Page

Page

STATUTES, RULES & REGULATIONS

SECONDARY AUTHORITIES

I. INTRODUCTION

Because every prerequisite for class certification is met, Lead Plaintiff's motion for class certification should be granted. Numerous ***common*** questions – primarily regarding defendants' fraudulent scheme and course of conduct – exist here and easily ***predominate*** over individual issues. Having failed to launch a single attack on the adequacy of Lead Plaintiff The Regents of the University of California, the defendants have conceded that ***adequacy*** is met. In addition, the proposed representatives' claims are ***typical*** of those of the class. Clearly a class action is the ***superior*** method to adjudicate these claims – at one time, in one trial.

After plaintiffs responded to three sets of document requests, four sets of interrogatories, one set of requests for admissions and participated in 23 class representative depositions held across the country, defendants make largely legal arguments and refer to the testimony of only a handful of class representatives.[1] Many of the arguments are a rehash of ones they already lost in the first round of motions to dismiss, or are the subject of the second round of motions to dismiss pending before the Court.

---

[1] This combined reply brief is submitted in response to the separate briefs filed by: (1) the Financial Institution defendants; (2) Vinson & Elkins, LLP ("V&E"); (3) Certain Defendants (Lay, Skilling, Pai, Sutton, Buy, Frevert, Horton, Causey, Kean, Koenig, McMahon, Rice and Olson have filed a brief in opposition to plaintiffs' §10(b) and Rule 10b-5 claims); (4) Outside Directors (The Outside Director Defendants are Robert A. Belfer, Norman P. Blake, Jr., Ronnie C. Chan, John H. Duncan, Paulo V. Ferraz Pereira, Joe H. Foy, Wendy L. Gramm, Robert K. Jaedicke, Charles A. LeMaistre, John Mendelsohn, Jerome Meyer, Frank Savage, John A. Urquhart, Charls E. Walker, John Wakeham and Herbert Winokur, Jr.) (Richard A. Causey, Kenneth L. Lay, Rebecca Mark-Jusbasche and Jeffrey K. Skilling have adopted the Outside Directors' arguments.); (5) Certain Individual Defendants with respect to claims under §20A (Lay, Skilling, Causey, Frevert, Horton, Rice, Buy, Pai, Kean, McMahon, Olson, Sutton and Koenig); (6) Bank of America (Bank of America Corp. ("BAC") and Banc of America Securities LLC ("BAS"); (7) Alliance Capital Management, L.P. ("Alliance"); (8) Rebecca Mark-Jusbasche; (9) Ken Harrison; and (10) certain purchasers of Osprey notes who brought private cases on Osprey.

The Financial Institutions argue the fraud-on-the-market presumption does not apply in this case because defendants' fraud was hidden from the market. Thus, they claim individual issues of reliance will overwhelm issues common to the class. However, defendants overlook the fact that the Court has already stated that reliance can be established for plaintiffs' §10(b) claims by the fraud-on-the-market doctrine. *See In re Enron Corp. Sec. Litig.*, 235 F. Supp. 2d 549, 693 (S.D. Tex. 2002). As a corollary to this argument, V&E, rehashing the motion to dismiss, asserts that the fraud-on-the-market presumption cannot apply to it because there is no ***evidence*** V&E actually authored documents that the market relied upon. Whether and to what extent V&E created statements that made their way to the market has no place in the class certification decision, but is a question for trial. And, in any event, the Court has already held V&E drafted documents at the heart of the case. *See* §IV.A.

Some defendants argue individual issues regarding damages and the timing of plaintiffs' purchases preclude certification. The vast majority of courts, however, hold such differences among class members are no bar to class certification. *See* §IV.B.

Defendants also claim the class as proposed by plaintiffs suffers from severe manageability problems. Defendants in essence argue that their fraud was so wide-ranging, class treatment poses insurmountable hurdles. Nonsense. The Court thus far has masterfully managed this litigation and there is no reason to presume the size of the case will pose any problems that cannot be managed by the Court with counsel's assistance. No amount of slicing and dicing of the class will make the litigation or the trial progress more smoothly. Defendants' worst-case scenarios are nothing more than last-ditch road blocks set up to stop this case from proceeding in a unified manner. Their heavy reliance on cases such as *Castano* is misplaced because there the class was all persons who were addicted to cigarettes since 1943, the class was difficult to identify and since no single case had been tried using those plaintiffs' theories of recovery, no one could estimate how to try the case on an

individual basis, let alone on a class-wide basis. Lead Counsel has tried securities cases and this one – of all cases – can and should be tried on a class basis. *See* §V.

The Financial Institutions argue for a shortened class period. They assert that the class period should commence no earlier than April 1999 and should end in October or early November 2001. They are thus asking for an adjudication on their statute of limitations argument and on exactly when the truth was fully revealed to the market. But numerous cases hold issues as to the length of the class period are not matters to be decided at class certification. Accordingly, the class period should not be shortened. *See* §VI.

Defendants claim proposed class representatives lack standing to bring claims under §12(a)(2) of the Securities Act of 1933 ("1933 Act"). But proposed intervener ICERS has standing to bring a §12(a)(2) claim. And, ICERS can properly represent all foreign debt securities purchasers. Indeed, Lead Plaintiff can also properly represent a class of foreign debt securities purchasers because its claims share numerous common questions with the §12(a)(2) claims. *See* §VII.

In another attempt to stymie certification, defendants argue §11 claims should not be certified, or in the alternative, various subclasses should be created. The claims under §11, however, are based on the same false financial statements that form the bulk of plaintiffs' §10(b) claims and individual issues can easily be managed at trial with interrogatories. *See* §VIII. Similarly, the §20A claims should be certified. *See* §IX.

In sum, defendants have presented no valid opposition to class certification. A single class, as plaintiffs defined, can and should be certified.

II. EVERY PREREQUISITE FOR CLASS CERTIFICATION IS MET

Plaintiffs have satisfied all of the requirements of Federal Rule of Civil Procedure 23(a) and 23(b)(3), and thus, class certification is warranted. Because "Rule 23 is a remedial rule [courts] should ... construe[] [it] liberally to permit class actions, especially in the context of securities fraud

suits, where the class action device can prove effective in deterring illegal activity." *Longden v. Sunderman*, 123 F.R.D. 547, 551 (N.D. Tex. 1988). "The utility of the class action to cases involving the securities laws has been repeatedly recognized." *Gibb v. Delta Drilling Co.*, 104 F.R.D. 59, 71 (N.D. Tex. 1984). Indeed, class actions are a "particularly appropriate and desirable means to resolve" securities class actions. *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985). As such, the federal courts have consistently recognized the utility – and indeed necessity – of Rule 23 class actions to remedy violations of the federal securities laws. *See, e.g., Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988); *Blackie v. Barrack*, 524 F.2d 891, 903 (9th Cir. 1975); *Korn v. Franchard Corp.*, 456 F.2d 1206, 1209 (2d Cir. 1972); *King v. Kansas City S. Indus., Inc.*, 519 F.2d 20, 25-26 (7th Cir. 1975); *Esplin v. Hirschi*, 402 F.2d 94, 101 (10th Cir. 1968). Federal Rule of Civil Procedure 23(a) sets forth the prerequisites for a class action:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

All defendants concede numerosity is satisfied here. Although the exact number of persons in the class is unknown, it clearly numbers in the many thousands.[2] "Plaintiffs are permitted to reasonably approximate the size of the class to satisfy the burden." *Henry v. Cash Today, Inc.*, 199 F.R.D. 566, 569 (S.D. Tex. 2000) (Harmon J.).

"The second prerequisite, commonality, or shared issues of law and fact, is not a high burden." *In re U.S. Liquids Sec. Litig.*, H-99-2785, 2002 U.S. Dist. LEXIS 26714, at *10 (S.D. Tex. Apr. 29, 2002) (Harmon J.). "Commonality is satisfied when there is 'at least one issue whose

---

[2] Over one million notices regarding the AWSC settlement were mailed to class members.

resolution will affect all or a significant number of the putative class members.'" *Durrett v. John Deere Co.*, 150 F.R.D. 555, 557-58 (N.D. Tex. 1993).[3] Here, there are many common issues, including: whether the defendants violated the federal securities laws; whether defendants omitted and/or misrepresented material facts; whether the defendants engaged in a manipulative scheme; whether the price of Enron's securities was artificially inflated during the class period; and the extent of damages sustained by class members, among many others. *See In re Firstplus Fin. Group, Inc. Sec. Litig.*, No. 3:98-CV-2551-M, 2002 U.S. Dist. LEXIS 20446, at *9 (N.D. Tex. Oct. 23, 2002) (noting the threshold of commonality is not high). Here, defendants do not seriously contend commonality is not met.[4] Instead, the focus of defendants' briefs is issues regarding predominance, manageability and superiority. *See infra* §§IV., V.

The "typicality requirement is also not high." *U.S. Liquids*, 2002 U.S. Dist. LEXIS 26714, at *10. "It mandates that the members have the same interests and have suffered the same injuries as others in the putative class." *Id.* "The court focuses on the legal and remedial theories of the named plaintiffs and the class members they seek to represent." *Id.* at *10-*11.

"The factual background of each named plaintiff's claim need not be identical to that of all the class members as long as 'the disputed issue of law or fact occup[ies] essentially the same degree

---

[3] All emphasis is added and citations and footnotes are omitted unless otherwise noted.

[4] Certain Defendants rely on *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732 (5th Cir. 2003), for the uncontroversial proposition that in determining whether common legal issues predominate the court should consider how the case will be tried. Certain Defendants' Brief in Opposition to Class Certification of Plaintiffs' Section 10(b) and Rule 10b-5 Claims ("Certain Defendants' Opp.") at 3. Here, of course, consideration of how the case will be tried demonstrates that common legal issues predominate. Plaintiffs expect the core of the case to concern Enron's fraudulent financial statements, with various transactions entered into between the Banks and Enron to be detailed for the jury. The various individuals will be tried once, with testimony and documentary evidence detailing their knowledge throughout the Class Period – like any other securities fraud action.

of centrality to the named plaintiff's claim as to that of other members of the proposed class.'" *In re WorldCom Inc. Sec. Litig.*, No. 02 Civ. 3288, Order at 19 (S.D.N.Y. Oct. 24, 2003) (Ex. 1)[5] (quoting *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 293 (2d Cir. 1999)). Judge Cote's application of the typicality requirement in *WorldCom* applies with equal force here. Judge Cote stated:

> The course of conduct alleged by the plaintiffs includes a pervasive accounting fraud and the correspondingly pervasive failure of those charged with monitoring and evaluating WorldCom to review diligently the company's financial records and representations, and of those who speak of WorldCom's financial condition to do so honestly and accurately. The claims of the named plaintiffs arise from that course of conduct and are typical of the claims of the class.

WorldCom, Order at 20.

The adequacy element also is met in this case. "To satisfy the adequacy requirement of class certification, Plaintiffs must ... show[] that "'the representative[s] will vigorously prosecute the interests of the class through qualified counsel.'"" *Dartley v. Ergobilt*, No. 3:98-cv-1442-M, 2001 U.S. Dist. LEXIS 20631, at *5 (N.D. Tex. Dec. 3, 2001). The Fifth Circuit recognizes that class certification adequacy standards have not been changed by the PSLRA. And the Court has held the Fifth Circuit "pronounce[d] emphatically that it has not 'created an additional independent requirement for the adequacy standard for class certification under Federal Rule of Civil Procedure 23 by reading provisions of the [PSLRA] into Rule 23(a)(4)' nor 'changed the law of this Circuit regarding the standard for conducting Rule 23(a)(4) adequacy inquiry.'" *In re U.S. Liquids Sec. Litig.*, No. H-99-2785, 2002 U.S. Dist. LEXIS 26713, at *8 (S.D. Tex. June 12, 2002) (quoting *Berger v. Compaq Computer Corp.*, 279 F.3d 313 (5th Cir. 2002)). "[W]hat must be shown to establish adequacy is two-fold: that plaintiff's counsel has the zeal and competence to represent the

---

[5] All "Ex.__" references are to the Appendix filed herewith.

class, and that the proposed class representative is willing and able to take an active role in controlling the litigation and protecting the absent class members." *Firstplus*, 2002 U.S. Dist. LEXIS 20446, at *18-*19. Practically conceding adequacy is met here, few of the defendants have done more than made half-hearted swipes at the adequacy of proposed class representatives. The failure of these moving defendants to raise a real adequacy objection further underscores the wasteful nature of the 23 day-long depositions that took place during August and September 2003.

Despite defendants' protestations to the contrary, this action also satisfies Rule 23(b)(3). Predominance, in the context of Rule 23, means those issues or defenses claimed on behalf of the class ought to be superior to and unencumbered by any individual claims or issues that may affect the lawsuit.[6] Rule 23, however, does not require each issue in the case to be similar for all class members, only that common questions predominate over individual issues. *Longden*, 123 F.R.D. at 556. "Predominance will be established if 'resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized

---

[6] The Financial Institutions' reliance on *Smith v. Texaco, Inc.*, 263 F.3d 394 (5th Cir. 2001), is wholly inappropriate. The Financial Institution Defendants' Memorandum of Law in Opposition to Lead Plaintiff's Amended Motion for Class Certification ("Financial Institutions' Opp.") at 6. The Fifth Circuit withdrew that opinion two months after issuing it. *Smith v. Texaco, Inc.*, 281 F.3d 477 (5th Cir. 2002). Other defendants misquote and misinterpret the *Walsh v. Ford Motor Co.*, 807 F.2d 1000 (D.C. Cir. 1986), opinion. Certain Defendants' Opp. at 2. The appellate court did not affirm the denial of class certification, but instead vacated and remanded the district court's decision to certify classes based in significant part on the district court's improper construction of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act ("Magnuson-Moss"), rather than a normal application of Rule 23 standards. The appellate court flatly rejected the district court's interpretation that Rule 23 may be applied less stringently in Magnuson-Moss cases and therefore remanded the case to the district court to determine what classes may be certified under Rule 23. *Walsh*, 807 F.2d at 1007. Just as in *Walsh, Alabama v. Blue Bird Body Co.*, 573 F.2d 309 (5th Cir. 1978), an antitrust case, is equally inapposite. The *Blue Bird* court certified a nationwide class for the limited purpose of determining liability of manufacturers and distributors engaged in a conspiracy to fix prices and restrain trade in connection with the purchase of school bus bodies. *Id.* at 320. Although the appellate court reversed and remanded the district court's order granting national class certification, it did not hold as a matter of law that all possibility of class certification was defeated. *Id.* at 323.

proof, and if these particular issues are more substantial than the issues subject only to individualized proof.'" *WorldCom*, Order at 38 (citing *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002)).

Common issues predominate here. All of the asserted claims arise from the same fraudulent scheme that affected all proposed class members. *Durrett*, 150 F.R.D. at 560. As explained more fully below, contrary to defendants' arguments, individual issues of reliance do not exist here, destroying predominance. First, there is no reliance element in plaintiffs' Texas Securities Act or 1933 Act claims (including plaintiffs' claims under §§11, 12(a)(2) and 15). Second, with respect to claims under the Securities Exchange Act of 1934 ("1934 Act"), plaintiffs avail themselves of the fraud-on-the-market presumption.

As in *WorldCom*, "[t]he claims based on Sections 11 and 12(a)(2) of the Securities Act and Section 10(b) of the Exchange Act are based on a common nucleus of facts and a common course of conduct." *WorldCom*, Order at 51. Common questions of law and fact will predominate as to likely defenses that will be presented at trial. *Id.* at 51 n.30.

The superiority element also is clearly met here. The class action device is a superior method for resolving plaintiffs' claims because it provides the fairest and most efficient adjudication. Indeed, here it may be the only way to resolve thousands of persons' claims. Securities class actions are both cost effective and manageable. Courts in the Fifth Circuit recognize the efficacy of the class action device for redressing injury to large groups of individuals harmed by a common set of operative facts. "It is desirable that securities fraud cases involving a large number of plaintiffs with small individual claims proceed as class actions ...." *Keasler v. Natural Gas Pipeline Co.*, 84 F.R.D. 364, 368 (E.D. Tex. 1979).

As this Court has noted, factors a court should consider in determining whether a class action is superior to other methods of adjudication

include the interest of members of the class in individually controlling the prosecution of separate claims, the extent and nature of any litigation concerning the controversy that has already been initiated by class members, the desirability of concentrating the litigation of the claims in a particular forum, and the likely difficulties in the management of a class action, as well as the policy underlying Rule 23 to "achieve economies of time, effort and expense, and promote uniformity of decisions as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."

U.S. Liquids, 2002 U.S. Dist. LEXIS 26714, at *14-*15 (quoting *Blue Bird*, 573 F.2d at 315).

III. THE PROPOSED CLASS REPRESENTATIVES HAVE DEMONSTRATED THAT THEY WILL ADEQUATELY PROTECT THE INTERESTS OF THE CLASS

As detailed below, each of the proposed class representatives has demonstrated his or her adequacy in vigorously litigating the action on behalf of the class. These institutions and individuals have a real and demonstrable stake in how this litigation proceeds. They are active, informed and dedicated to seeing this matter to final resolution, whether by trial or settlement. And while the bulk of defendants opposing class certification fail to question the proposed representatives' adequacy, Lead Counsel believes the Court should be aware of the knowledge, commitment and heart-felt dedication the proposed class representatives exhibited during the oftentimes grueling depositions they were required to attend.

A. Lead Plaintiff The Regents

The Regents suffered a $144 million loss from its purchases of Enron common stock during the class period. Appointing The Regents Lead Plaintiff the Court stated it was "confident that the Regents ... is capable of monitoring the lawyers here and industriously pursuing Plaintiffs' claims." *In re Enron Corp. Sec. Litig.*, 206 F.R.D. 427, 458 (S.D. Tex. 2002). The Court further stated The Regents "and its attorneys[']zealous prosecution of this action is already evident." *Id.* at 454. Most recently, in approving the settlement with AWSC, the Court noted The Regents "is experienced and has demonstrated highly professional administration of the litigation." *In re Enron Corp. Sec. Litig.*, No. H-01-3624, Order at 24 (S.D. Tex. Nov. 5, 2003). As demonstrated in Lead Plaintiff's opening

brief, The Regents has unremittingly prosecuted this action and diligently exercised its fiduciary responsibilities on behalf of the class.

- The Regents together with other Lead Plaintiff movants sought to freeze more than $1 billion in insider trading proceeds;
- The Regents together with other Lead Plaintiff movants were the first to seek an order preventing further destruction of documents at Andersen and sought depositions on this issue;
- The Regents actively monitors the litigation and Lead Counsel's prosecution strategy, reviewing all pleadings and conducting a weekly conference call with Lead Counsel;
- The Regents' in-house lawyers have attended all court hearings and a representative of The Regents attended each of the mediation sessions with Andersen and attended mediation before Judge Conner;
- The complaints filed on behalf of the class represent the comprehensive effort by The Regents and its counsel to maximize the recovery for the entire class, championing all worthwhile claims and seeking compensation from all viable sources;
- The Regents filed a motion to preclude the entry of a blanket protective order;
- The Regents has been active in Enron's bankruptcy, filing motions in the Bankruptcy Court to obtain evidence produced by Enron and third parties; and
- The Regents filed motions to require Enron to produce documents that it had provided to the government.

Additionally, on August 25, 2003 Jeffrey Heil, the designated witness on behalf of The Regents, appeared for deposition. Mr. Heil was deposed from 9:00 in the morning until nearly 8:00 at night. Mr. Heil testified he had directed the gathering of responsive documents to be produced in this case in connection with the class certification process. Ex. 12 at 23. Mr. Heil testified that all responsive documents related to The Regents' decision to invest in Enron had been produced. *Id.* at 28. Mr. Heil further gave in-depth and extensive testimony regarding The Regents' decision to purchase Enron stock. There is simply no doubt this public institution is adequate. Indeed, The Regents' direction of this litigation is a high-water mark in modern securities litigation. The Regents' vigorous prosecution of this action fulfills the ideals of the PSLRA.

B. Designated Class Representatives

Lead Plaintiff "need not name a representative of the class for each subgroup of securities," where, as here, "common issues predominate as to all the securities." *In re American Continental Corp./Lincoln Savings & Loan Sec. Litig.*, 794 F. Supp. 1424, 1461 (D. Ariz. 1992). Nonetheless, Lead Plaintiff has designated certain purchasers of Enron securities to serve as additional class representatives. Consistent with precedent in other securities actions, the Court has previously certified a lead plaintiff's designated class representative who complied with established standards under Rule 23. *See Collmer v. U.S. Liquids, Inc.*, 268 F. Supp. 2d 718, 724 (S.D. Tex. 2001) (appointing class representatives who were not named lead plaintiff). The proposed class representatives bring a vast array of claims under numerous legal theories and include individual investors, public and private institutional investors, a former Enron employee and a charitable organization. They constitute a microcosm of the class and they share a common goal of representing the best interests of the class as each purchased Enron securities and has suffered a loss resulting from defendants' fraudulent scheme.

1. Plaintiff Purchasers of Enron's Common Stock

George M. Placke has worked in the oil and gas business for over 20 years in Corpus Christi, Texas. On August 14, 2003 Mr. Placke was deposed by defendants. Mr. Placke testified he has spent between 15 and 20 hours on the litigation. Ex. 15 at 49. He has received voluminous documents from counsel that he has read. *Id.* at 50. He possessed a keen understanding of the procedural history of the action, including the filing of the Amended Complaint, *id.* at 54, the proposed trial date, *id.* at 65, and the proposed class period, *id.* at 66. He was able to name numerous defendants. *See id.* at 80, 85. He also clearly enunciated the claims being made in the lawsuit, *id.* at 87-88. And he has met with the attorneys numerous times both in person and on the

phone. *Id.* at 123. Moreover, Mr. Placke demonstrated an understanding of his role as a class representative.

> Q: What do you consider to be your responsibilities as a class representative?
>
> A: I'm here to see that the firm of Milberg & Weiss does the best job it can in representing all the class members, that we have the best shot we can get, both me and all those other members, of getting some of our money back.

Id. at 56-57. Mr. Placke is an ideal class representative. He has remained active and involved throughout the course of the litigation and has also testified that he will "do whatever I'm requested to do." *Id.* at 62. This would include meeting with other class representatives and testifying in Court if necessary. *Id.* at 62, 64.

Michael J. Bessire has worked for over 30 years in the grocery business and lives in Lubbock, Texas. On August 22, 2003, Mr. Bessire was deposed by defendants. During his deposition Mr. Bessire testified he has had numerous contacts with his attorneys including a number of phone calls and has also received summary updates regarding what is going on in the case. *See* Ex. 16 at 120. He provided detailed testimony regarding the allegations in the complaint, including the role played by various defendants. *See id.* at 121-122. He also testified that before becoming involved in the lawsuit he had a face-to-face meeting with lead counsel to gather more information which would "warrant me wanting to be involved in this process." *Id.* at 125. Mr. Bessire testified that as the litigation goes on "I'm prepared to spend whatever time is necessary to fulfill my obligation in this role." *Id.* at 138. He also testified regarding his responsibility regarding the attorneys in the case.

> Q: Well, do you have any responsibility to direct what your lawyers are doing or monitor what they're doing?
>
> A: I believe communicate with them would be more what I perceive my responsibility to be and communicate with them enough to where I'm comfortable with the direction that they're going.
>
> Q: And if you're not comfortable with the direction they're going, do you have any obligations to take action?

A: I believe as time goes on, I would – I would feel obligation to address it with the rest of the class members, if there was something happening to the degree that I didn't feel like I could support.

Id. at 150. Mr. Bessire also testified as to why he decided to become involved in the litigation.

Q: Why are you involved here, sir?

A: Well, it's – it's really a philosophical reason. I believe that there was – there was a huge deception that was intentional that took place. I think there was – there were a number of parties that conspired. I think the greed factor is – is to the scope that the American public's never seen before. And I think I want to, in some way, take a stand, and if it means, you know, doing – being deposed or appearing at a trial or, you know, having to memorize 1,150 pages of documents to make this thing happen, I'd like to see – I'd like to see a ruling that would prevent this type of action, if, in fact – you know, this type of alleged action, if it's – if it's seen by a judge and jury that it did take place in the – in what I perceived, I'd like to see that – a ruling that's so grave that it provides a disincentive for anyone to ever think of doing this again. I think there are hundreds of thousands of people outside of the scope of just employees whose lives were altered forever, and people should not be able to personally benefit at the cost, you know, of tens of thousands or hundreds of thousands of people. And so I want to participate in that activity, and I'd love to – love to see this thing prevail, if for no other reason, that.

Id. at 198-199.

Dr. Richard Kimmerling is a practicing surgeon in an Atlanta suburb. Dr. Kimmerling was deposed by defendants on August 21, 2003. Dr. Kimmerling was able to identify a number of the defendants, as well as their role in the case. *See* Ex. 17 at 23, 27-28. He has kept up to date with pleadings filed in the action and has had contact with his attorneys throughout the course of the litigation. *See id.* at 42-43. He has received numerous documents from his attorneys. "I have received a lot of material to show what the attorneys have been doing in the case. And, of course, I can't read every bit of it, but what I have perused through, I felt they were doing a very satisfactory and adequate job." *Id.* at 45. He has also reviewed some of the rulings in the case including the motions to dismiss. *Id.* at 53-54. Dr. Kimmerling was aware of the class period as well as a number of the claims in the action. *See id.* at 58, 61. Importantly, Dr. Kimmerling possessed a clear understanding of his obligations as a class representative.

Q: What do you understand your obligations as a named plaintiff or class representative to be?

A: Well, to be truthful and represent, as best I can, the other members of the class.

Q: What is it – what is the scope of the obligation that you understand you owe to the rest of the class?

A: Well, I guess to – to perhaps be a little more informative than I am concerning the ongoing investigation and the court proceedings in the future.

Q: Do you know what a fiduciary duty is?

A: Yes.

Q: Do you understand that you owe a fiduciary duty to the other class members?

A: I feel that, yes.

Q: And what do you understand the fiduciary duty or the nature of the fiduciary duty that you owe to the other class members to be?

A: Well, to – as an example, to be here, going through this interrogation and answering as best I can.

Id. at 56-57. Moreover, Dr. Kimmerling has agreed to do whatever is necessary going forward.

Q: In the event that you are selected or approved as a class representative, do you have any expectation as to how much time you'll have to spend on this litigation going forward?

A: Well, I imagine there'd be other depositions to give, and maybe testify in court, but I've agreed to do that.

Q: And how much time do you think those sorts of activities would take?

A: Well, hopefully not a lot, but I've agreed. I said – gave my word that I would follow through, and I will.

Id. at 64.

Michael B. Henning is an insurance executive who lives in Florida. On August 20, 2003 Mr. Henning was deposed by defendants. Mr. Henning has communicated with his attorneys on a number of occasions, has reviewed the bulk of the documents sent to him and understands the allegations in the complaint. Ex. 18 at 71. He is aware of the allegations in the complaint and

possesses detailed knowledge of various illegal schemes pled in the complaint. *See id.* at 83-84. He was familiar with a number of the defendants, the class period, as well as the present status of the litigation. *See id.* at 89-96. He expressed a willingness to participate "in any kind of meetings or anything that they wanted me to participate in." *Id.* at 97. He also testified that he understood that he had a duty to the class members.

> Q: And how do you propose to execute or to fulfill that duty?
>
> A: Well, I mean, I'll read as – as much of the detail. I would assume that – as things go on, that there will be more activity than we've had in the past. I'd be happy to testify. I'll be happy to attend meetings with the other plaintiffs, meet with them, do whatever it takes to proceed.

Id. He also possessed a distinct awareness of various issues, including how ultimate recovery in the action would be determined. *See id.* at 98. Mr. Henning also noted that, like other investors, all members of the class were relying on similar information. "[I]t seems that the classes – that we were all basically making our decision on the same types of information." *Id.* at 138. Mr. Henning was also able to detail the various defendants and was able to tie those defendants to specific transactions. *See, e.g., id.* at 176 (noting Citigroup's involvement with Delta, JP Morgan with Mahonia and Barclays with Hawaii 125). Mr. Henning is an ideal class representative – active, able and informed and willing to work in the best interests of the class.

John Zegarski is a former Enron broadband construction employee who purchased Enron equity securities in his 401(k) account. Mr. Zegarski was deposed on August 29, 2003 by defendants. Mr. Zegarski is an ideal class representative. He detailed the allegations in the complaint including naming various defendants. *See* Ex. 19 at 51. He was also aware of the class period and was informed as to the status of the litigation.

> Q: Have you been following the developments in this case?
>
> A: Yes.
>
> Q: What is your understanding of what has transpired thus far in the case?

A: Recently or –

Q: To the best of your recollection, from beginning, from the initiation of the suit.

A: I know the judge has dismissed several motions by the banks, several of the officers, that – that it's going to mediation. I know that there's been some dealings up in – some settlements coming out of New York. There's been some hearings.

Id. at 56. Mr. Zegarski is aware of the name of the judge, where the case is pending and is keenly aware of his obligations as class representative.

Q: Mr. Zegarski, what is your understanding of your obligations as class representative?

A: To stay informed about the case; stay in contact with lead counsel at Milberg, Weiss; to commit to testify if called upon and --

Q: You mentioned stay informed. Have you stayed informed thus far?

A: I try to.

Q: How do you do that?

A: Through communication with lead counsel, Milberg, Weiss, various media outlets, the Internet.

Id. at 57. Mr. Zegarski also stated his reasons for wanting to be a class representative.

A: Because I want to see some justice. The way I look at it, they stole close to $50,000 from me, Enron, the banks, the attorneys, Arthur Andersen.

Q: And how did they steal that money from you in your opinion?

A: Through facilitating fraudulent transactions, by wiping debt off the balance sheets, artificially inflating the price of the stock.

Id. at 63. Mr. Zegarski also clearly testified that he would not put his own interests ahead of those of the class.

Q: If you were given an opportunity to recover all the money you lost in your investment in Enron in exchange for withdrawing from the class, would you do so?

A: No.

Q: Why not?

A: Because I'm representing the class, and the class interests come before mine.

Id. at 205.

Joseph C. Speck worked for 35 years as a CPA in Peoria, Illinois and is now retired in Florida. On August 19, 2003 Mr. Speck was deposed by defendants. Mr. Speck possesses a detailed understanding of the allegations in the complaint. *See* Ex. 20 at 76-77. He also was able to identify numerous defendants as well as their role in the fraud. *See id.* at 79-82. He was familiar with the judge, *id.* at 85, as well as the class period, *id.* at 87. Mr. Speck gave detailed testimony regarding mark-to-market accounting that was abused by Enron as well as various SPEs used by Enron. *See id.* at 157. Mr. Speck is also committed to being an active class representative. He is dedicated to remaining thoroughly knowledgeable about the case, *id.* at 206, and while noting that being a representative could involve "quite a bit of work potentially," he is dedicated to the process, *id.* at 210. His in-depth understanding of accounting as well as his knowledge of the claims in the litigation make him an exemplary representative. *See id.* at 218-219. Mr. Speck has read the complaint, at least 400 pages of it, and understands his role in the litigation.

Q: You were asked this afternoon about your responsibilities as a class representative. If you were to hear from any other source something that gave you pause, that was in – say that was in contrast or contradicted something you'd read in Exhibit 4, in that 400 pages –

A: Yes.

Q: – what would you do?

A: Well, I'd contact you and try and get a clarification of it, I imagine.

Q: Do you see that as part of your role, to supervise?

A: Yes.

Q: Has anybody ever given you any restrictions on when you can contact Milberg, Weiss and when you can't?

A: No.

Q: What is your understanding of – of when you can contact your lawyers?

A: When it's – I mean, I understand contact them at any time, but

Q: And if you ever found something that gave you pause would you do that?

A: Yes.

Q: What's the goal? What's your goal as a class rep?

A: As a class rep, of course, we're trying to get every bit of money we can for this particular class, every bit that's coming to us. Every bit we can possibly get.

Id. at 301-302.

Ben L. Schuette is a retired electrical contractor from Corpus Christi, Texas. Mr. Schuette was deposed on August 13, 2003 by defendants. Mr. Schuette has a clear understanding of his role as a class representative.

Q: [W]hat do you understand to be your responsibilities as a class representative?

A: For me as a class representative, to represent all of the people in the class that are in the same situation I'm in, plus myself, of course.

Q: Okay. And how do you understand that you're to do that?

A: By testify [sic ing] – by doing this deposition and by appearing in court if I have to.

Ex. 21 at 75. Mr. Schuette also has an understanding of the claims in the case. *See id.* at 87. And he has spent a number of hours keeping up to date on the litigation. *Id.* at 93. He has produced documents. *Id.* at 97. He has reviewed orders by the Court. *Id.* at 162. He is also aware of the class period and was familiar with the role played by the Financial Institutions, *id.* at 125, as well as V&E, *id.* at 145. In all, Mr. Schuette displayed a perfect understanding of his role as a class representative.

San Francisco City and County Employees Retirement System, which provides benefits for thousands of active and retired city and county employees, was deposed on August 29, 2003 by defendants. Carl Wilberg is the Senior Investment Officer of the equity unit. Mr. Wilberg provided detailed information regarding San Francisco City and County Employees Retirement System's

purchases of Enron stock. Mr. Wilberg also displayed an in-depth understanding of the facts of the case. *See* Ex. 22 at 138-39. Mr. Wilberg was able to provide detailed testimony regarding the role of various defendants, including V&E, *see id.* at 208-09, and noted that the City Attorney's office and the lawyers for the Retirement System would be monitoring the progress of the litigation.

> Q: And why would you expect them to do that?
>
> A: Because they're – that's their assignment. My assignment is to manage the portfolio, and their assignment is to look at legal issues. And – and we would rely on our City attorney and our outside attorney.

Id. at 227. Mr. Wilberg made clear that San Francisco was not going to be the lead plaintiff but instead they would be a "major participant." *Id.* at 230.

John J. and Charlotte E. Cassidy, as trustees for the John and Charlotte Cassidy Family Trust, both worked at Pacific Telephone for over 30 years. Mr. Cassidy was deposed on September 4, 2003. Mr. Cassidy is an ideal class representative. He has read the complaints filed in the action, has corresponded frequently with his attorneys and has done his "homework with the attorneys." Ex. 23 at 10. He was aware of the various complaints filed in the action as well as the allegations in the complaints. His knowledge of the allegations is quite detailed.

> Q: What fraudulent actions do you believe were taken?
>
> A: Well, we can start with the very beginning, with the officers and the board. They created an impression on the financial statements that the company was solvent when it wasn't. They put that information over to Andersen, the accountant. They concurred when it wasn't true. It went from there to the banks. The banks not only concurred, they financed it, and they brought it into – they created more straw companies. I'm using the straw company as an expression of SPEs. They created all these straw companies and then they financed those, and then they implemented those and put them into – into – into the action. And finally, we get to Vinson & Elkins and – and – and they did nothing to – but concur in the – in – in the proceedings, which means, to me, they condoned it. If they didn't – if they didn't stop Enron, then that was the final fire wall. There was nothing else. It burned to the ground.

Id. at 40-41. Mr. Cassidy has participated in a conference call with other proposed class representatives. *Id.* at 48. He is familiar with the judge and various rulings in the case. *Id.* at 49.

He is also familiar with procedural history of the case including detailed knowledge regarding the recent mediation session. *Id.* at 50. Most importantly, Mr. Cassidy had a flawless understanding of his role as a class representative.

> Q: What is your understanding of your responsibilities as a class representative?
>
> A: Well, first of all, I have to keep the interest of my class people equal to mine so that I don't take any personal remuneration or whatever else, benefits, over them. Second, I must keep informed, which my attorneys have very well done, kept me informed. And the next thing I agreed to would be to testify at the trial, if necessary. And I think, hopefully somewhere down the line there'll be a settlement, and I will be responsible to get the best settlement I can for my – for my class and for myself, equal.

Id. at 51. Mr. Cassidy testified that he depends on his attorneys to do the "lawyering" for them, but gives any input that is asked for by them. *Id.* at 52. He is willing to devote whatever time is necessary going forward in the case. *Id.* at 54. Mr. Cassidy was also able to name a number of the defendants. *Id.* at 144, 147-148, 158. He also explained why he was participating in the litigation: "Well, I want to see some justice done for the taking of my – my retirement fund personally, but there's a lot of other people in the same boat. I'd like to help them." *Id.* at 203. He also spoke of his duties as a class representative stating that they were

> to represent the class interests and my interests equally, to testify if I'm recalled, to assimilate and – and gather and study all of the information my counsel provides me so I can keep up-to-date on what – the proceedings, and should a settlement somewhere along the line be offered, to help protect the class investments and see they get a fair share.

Id. at 204. Issues raised by certain defendants regarding Mr. Cassidy's ability to represent a class in relation to the §20A claim are discussed *infra* at §IX.B.8. Those arguments related to Mr. Cassidy's position as a trustee are meritless.

Dr. Fitzhugh Mayo has been a doctor for more than 40 years. He is now retired. On September 17, 2003, defendants deposed Dr. Mayo. Dr. Mayo was familiar with the allegations in the complaint. *See* Ex. 24 at 94-95. He also testified that he would be willing to testify at trial. *Id.*

at 91. He understood the length of the class period, has kept up to date on the litigation and has read various opinions by the judge. *Id.* 118-119. He has also participated in conference calls, *id.* at 120, and has testified regarding his view on managing counsel. "Well, I would expect an explanation of them ... of all the strategic planning going into the handling of the case, and I would expect them to listen to class representatives' opinions about that." *Id.* at 127. In total Dr. Mayo proved to be an active and informed class representative willing to do whatever was necessary in the best interests of the class.

2. Plaintiff Purchasers of Enron's Debt

Amalgamated Bank, as trustee for the Longview Collective Investment Fund, Longview Core Bond Index Fund and certain other trust accounts. On September 5, 2003, Louis Alexander Sarno provided a day-long deposition and clearly demonstrated Amalgamated Bank's adequacy in serving as a class representative. Mr. Sarno testified that he has met repeatedly with counsel, Ex. 13 at 11, and has had a conference call with other proposed class representatives, *id.* at 13. Mr. Sarno testified it was important to participate in the phone call "to get an update on the litigation and have a chance to ask questions to the attorneys and also to the other participants in the conference call." *Id.* at 14. Mr. Sarno testified Amalgamated Bank's trust committee has oversight of the litigation and is kept informed of proceedings in the litigation by counsel for the trust department. *Id.* at 21. Mr. Sarno testified he has read the complaint in this action. *Id.* at 26. He also testified Amalgamated Bank provided all documents regarding Amalgamated's Enron bond investments. *Id.* at 121. He is familiar with various pleadings in the case, including the mediation statement, orders of the Court and other documents. *Id.* at 135. Mr. Sarno was able to identify numerous defendants, as well as various defendants' roles in the alleged fraud. *Id.* at 227, 229. Critically, Mr. Sarno was well versed in the duties and responsibilities of the class representative.

Q: Do you understand what the duties to be a class representative are?

A: Yes.

Q: What are they?

A: You have a fiduciary responsibility to the – to the class, to the participants in the litigation. You have a duty to be involved with the proceedings. You have a duty to discuss with the attorneys and the other class representatives the proceedings in the case.

Id. at 142. In sum, Amalgamated Bank is an ideal class representative committed to the effective prosecution of this action.

Hawaii Laborers' Pension Fund, a $700 million Taft-Hartley pension fund that administers the retirement savings of thousands of building tradesmen and women, purchased Enron common stock and debt securities, including debt issued and sold in connection with the sale of $500 million of medium- and short-term notes. On September 26, 2003, Wayne Chun, fund administrator for the Hawaii Laborers' Pension Fund, sat for deposition. Mr. Chun testified that responsive documents were produced. *See* Ex. 14 at 24-25. He clearly stated his understanding regarding the claims made in the litigation, including describing allegations in the complaint. *See id.* at 65. He testified that he has reviewed decisions entered by the Court. *Id.* at 69. He also testified regarding Hawaii Laborers' Pension Fund's role in the litigation. *See id.* at 70. Hawaii Laborers' Pension Fund is a model representative.

Washington State Investment Board ("WSIB"), responsible for the management and investment of public retirement funds, purchased Enron's publicly traded debt securities. William Pierce Kennett, Senior Investment Officer for Fixed Income for WSIB, was deposed on September 23, 2003. Mr. Kennett provided detailed testimony regarding the Board's purchases of Enron debt and displayed an understanding of the class that WSIB was seeking to represent. Ex. 25 at 43. Mr. Kennett was also able to describe the class period in the case and noted that the Attorney General's office and others had been monitoring the litigation. "I know it's a very high priority for the attorney general's office and they will be devoting as much resources to this as they need. I have no doubt of

that – about that at all." *Id.* at 46. He also testified that the Attorney General's office meets with WSIB in executive session every month to fill them in on ongoing litigation and receive feedback. *Id.* at 47. Mr. Kennett was able to name a number of defendants, *see id.* at 54-55, as well as providing detailed information regarding the allegations in the complaint, *see id.* at 56-57. Mr. Kennett also displayed an understanding of the role of class representatives.

> Q: What do you understand to be the responsibilities or obligations of a class representative?
>
> * * *
>
> A: I believe it's to represent all members of the purported class, in this case, all Enron securities holders, and I think between myself and the attorney general's office, that we have to devote as many resources as necessary to this case to represent those class members. And I personally believe that I need to follow all the news, and I think the attorney general's office has to follow and stay current and monitor the legal proceedings.

Id. at 103. Importantly, Mr. Kennett also noted that the "overarching goal of the class is the same." *Id.* at 108. WSIB is precisely the type of active and involved class representative Congress envisioned in passing the PSLRA.

Employer Teamster Local Nos. 175 and 505 Pension Trust Fund ("Teamsters 175 & 505") is a Taft-Hartley pension fund that oversees the retirement savings of thousands of teamsters and has approximately $225 million in assets. On September 9, 2003, Randall Atkins, the business agent of the Union, was deposed by defendants. Mr. Atkins understood a number of key elements of the case. He knew that Enron filed false financials. *See* Ex. 26 at 72-73. He understood the class period. *See id.* at 79. He explained that the pension fund's attorneys would regularly report to the Board of Trustees regarding the status of the litigation. *Id.* at 165. He further understood the need to oversee the attorneys working on the case. *See id.* at 127. Most importantly, Mr. Atkins displayed a proper sense of his duty as a class representative. He stated he was willing to testify if necessary and that he would do anything required during the course of the litigation.

Q: How about besides testifying? Do you intend to have a role in the actual strategic or tactical decision making?

A: That's up to the – if it comes down – if we're allowed to do that, yes I'd do that.

Id. at 159.

He further recognized that as a class representative, the fund would have a duty to the class.

Q: You were asked about being a class representative, and at several points today, you've used the word "fiduciary duty." Is your – would your duty as class representative on behalf of – would the local teamsters, as a class representative in the *Enron* case, have duties that would go beyond the fiduciary duty they owe their members?

* * *

A: Yes, it would.

Q: And – and to whom would that duty flow?

A: To all of the people who have been harmed in this case.

Id. at 163-164.

Archdiocese of Milwaukee Supporting Fund, Inc. ("AMS Fund"), is a charitable non-profit organization that has donated over $40 million to charitable programs over the past decade. On September 11, 2003, Paula John, Director and Vice President of the grants department of the AMS Fund, was deposed by defendants. Ms. John testified regarding AMS Fund's purchase of Enron bonds and noted the responsibilities of a class representative: "The responsibilities would be to look out for the interest of the entire class." Ex. 27 at 49. Moreover, Ms. John testified as to her understanding that it would be the Court's role to determine whether or not to certify a class. *Id.* at 51. She also testified she would want to know everything that was going on in the case as it moved forward. *Id.* at 72. She also stated that the AMS Fund would help in any way and would "do whatever possible to help." *Id.* at 76. Ms. John testified she had received a number of pleadings filed in the action and keeps up to date by reading the documents. *Id.* at 157. Ms. John noted representing the class was "not about our personal interest anymore. It's about looking after the

interest of the entire class." *Id.* at 198. The AMS Fund has demonstrated its adequacy to serve as a class representative here.

Nathaniel Pulsifer, trustee of the Shooters Hill Revocable Trust, who on behalf of Shooters Hill Revocable Trust brings claims in connection with his purchase of the 7% exchangeable notes due July 31, 2002, was deposed by defendants on September 5, 2003. He testified that he has read documents in the case, including the mediation statement submitted by plaintiffs. Ex. 28 at 49. He provided detailed information concerning his involvement in bringing the litigation, testifying that one of the reasons he became involved in the litigation was "press reports of the alleged misconduct and the exchangeable note." *Id.* at 68.

He understood that a complaint has been filed and provided detailed testimony regarding the wrongdoing alleged as well as numerous defendants. *See id.* at 99-100. When asked about the misstatements of the underwriters, Mr. Pulsifer testified that the claim was brought "because the financial statements of Enron were restated and restated to reduce revenues and profits, there were clearly errors for which these people who signed the statements were responsible for." *Id.* at 101. He also testified as to his knowledge of various off-balance sheet deals conducted by Enron. *See id.* at 101-102.

Critically, Mr. Pulsifer displayed an in-depth understanding of his role as a class representative.

Q: Do you have any understanding of what your duties would be if you are certified as a class representative?

A: To represent the interests of the class, to be available, to stay informed on matters associated with the action.

Q: Anything else?

A: Work with counsel.

Q: Any other duties?

A: Specifically, no. But I think in the general, to keep the class informed....

Id. at 128.

Staro Asset Management LLC ("Staro") purchased the Zero Coupon Convertible Senior Notes due 2021. Donald T. Bobbs, Investment Analyst for Stark Investments, provided testimony on behalf of Staro. Mr. Bobbs testified that he and others had searched for responsive documents, making sure that Staro fully complied with document requests. Ex. 29 at 21. He was aware of the action brought on behalf of Staro. "We have the Section 11 claim against the officers and directors of Enron, as well as Arthur Andersen, and we are still being represented by Milberg, Weiss, who is the lead counsel representing the lead plaintiff the Regents of California which we are also a part of." *Id.* at 67. Mr. Bobbs had kept up on orders from the Court, and noted that in-house counsel and outside counsel were monitoring and supporting the litigation effort. *Id.* at 67. He was able to detail the allegations against the banks, *id.* at 211, and, most importantly, understood what it means to be a class representative as well as being a lead plaintiff.

> A: [M]y understanding is it's much like being a class representative, where you have to be generally familiar with what's going on and agree to produce documents; agree to make yourself available for depositions; be generally available to attend the trial, if necessary; be under the understanding that you're representing a class, not just, you know, yourself. And that's my ... basic understanding.

Id. at 81. Staro and its representative have demonstrated a willingness and ability to properly serve as a class representative in this action. As explained more fully *infra* at §XI., Alliance Capital Managements' arguments regarding Staro's ability to serve as a class representative are ill-founded.

Greenville Plumbers Pension Plan, a Taft-Hartley pension fund that oversees and administers the retirement savings of thousands of workers in the State of South Carolina, purchased Enron debt securities. On September 3, 2003, Theresa Warren was deposed. Ms. Warren is employed by Administrative Services, Inc. Ms. Warren was the chosen deponent because the Plan's advisors, whom made the investment decision for Greenville Plumbers Pension Plan, now work for

defendants and were unable to provide testimony. Greenville Plumbers Pension Plan has provided documents, testimony and otherwise has proved itself a proper representative.

3. Plaintiff Purchasers of Enron's Preferred Stock

Mervin "Buddy" Schwartz, Jr. worked for 38 years maintaining Hershey Candy Company production lines and is now retired. Mr. Schwartz was deposed on September 19, 2003 by defendants. Mr. Schwartz testified he has reviewed numerous documents sent to him by his attorneys, Ex. 30 at 73, and was able to detail various allegations in the complaint, including the roles of a number of the Financial Institutions, *see id.* at 78-79. He stated that he would represent a group of purchasers if he was thought to be qualified to do so. *Id.* at 81. He understood the length of the class period alleged and has committed to serving as a class representative. "I understand that to be that if – if I would be picked to be a representative, I would be representing all the people that were burnt the same as I was burnt, you know ... that bought stocks or bonds or whatever with – with Enron, you know, and I would be representing – representing all those people who – who had a loss." *Id.* at 90. He also testified he has met with counsel several times and when he has read things that he did not understand, he has called his lawyers to get answers. This was because Mr. Schwartz takes the Enron litigation very seriously. "This is serious to me. This is – like I said, they – they messed my life up, and I take it very seriously, very personal." *Id.* at 92. He also testified he would spend as much time as necessary working as a representative of the class. "I mean I guess whatever they tell me we have to do is what we'll do." *Id.* at 98. Mr. Schwartz also testified about his motivation in joining the class action.

> A: To actually recover some of my losses, plus, like I stated at first, the principle of the whole thing. I don't like people who steal. I don't like thieves. I don't like cheats. I think people should work for their money instead of steal, and I can see a conspiracy here with a whole bunch of people that wear suits and have lots of money thinking they can get away with whatever they can get away with, and there's a principle involved here. I'd actually like to see them all hung and I mean that very seriously.

Id. at 189. Mr. Schwartz is an impassioned and active representative willing to take whatever steps necessary in the management of the litigation. He is an ideal class representative.

Stephen M. Smith purchased shares of Enron capital 8% preferred stock. He was deposed by defendants on August 11, 2003. Mr. Smith was familiar with various defendants in the action. *See* Ex. 31 at 12. He has responded to document requests and has kept in touch with his attorneys. *Id.* at 66. He also possessed a detailed knowledge of the allegations in the complaint. *Id.* at 80, 89. He was aware of the procedural posture of the case as well as the proposed class period. *Id.* at 104-105. Most importantly, Mr. Smith understood his duties as a class representative.

A: I have obligations to all the members of the class to my – to my understanding, yes.

Q: And what are those obligations?

A: To – to put the interest of the class ahead of my own, to be sure that they're all treated fairly.

* * *

Q: Do you believe that you have a duty to supervise your counsel in this matter?

A: I believe that it is my obligation that if I see that they're doing something that is questionable, to call their attention to it, yes.

Q: What are you doing to supervise counsel?

A: Well, I'm trying to – to go over the documents they send me and keep track of what's going on at the time, to give testimony where it's needed and to appear at court if needed.

Q: And what do you understand your role to be as a class representative with regard to your interactions with counsel?

A: Same as I've just stated, to – to – I've agreed to come here for a deposition or to give testimony in court, to look over the documents that they furnish me to keep aware of what's going on with regards to the case and to discuss any questions I have or call it to their attention if I see something that I feel needs clarification or attention.

Id. at 107-108. Mr. Smith also testified that if he knew then what he knows now about his claims he would have never bought Enron stock. *Id.* at 193. In all, Mr. Smith proved to be an ideal class representative who is aware of his duties to the class.

4. Plaintiff Purchasers of Foreign Debt Securities

Imperial County Employees Retirement System. On September 24, 2003, Barbara Ann McFetridge, Division Manager for Retirement, was deposed by defendants. A fair reading of Ms. McFetridge's deposition transcript demonstrates ICERS has been an active and informed participant in this litigation and plans to continue in that regard. Ms. McFetridge clearly testified as to why ICERS seeks to be a class representative. "They want to be a class representative because they felt what had happened to their stock – what had happened to their interest in Marlin Water – came about fraudulently from the individuals and defendants and that they are seeking – and we have a responsibility to our retirees to be good fiduciaries. They feel it's their responsibility to – to seek this in the interests of the others." Ex. 32 at 41. Ms. McFetridge also clearly identified a number of the defendants in the lawsuit. "Arthur Andersen is the accounting firm, Vinson & Elkins is the attorneys. Ken Lay is one of the directors. One of the banks, J.P. Morgan Chase, Bank of America, Citigroup, Deutsche. There's several others. I don't recall them all." *Id.* at 57.[7] She has reviewed

---

[7] Ms. McFetridge also testified being a class representative is not a memory test.

Q: And you prepared for your deposition today, correct?

A: I prepared, but I didn't memorize things.

Q: Is it fair to say that the defendants – who the defendants are in a lawsuit that you're bringing is an important aspect of the lawsuit?

A: It's an important aspect, but I don't expect to have it down by memory. I expect to be able to have a document in front of me with that on it ...."

Id. at 236-237

the complaint and other documents sent to her by counsel. *Id.* at 96. She demonstrated an understanding of the nature of the fraud, including the nature of the claims against the director and officer defendants. *See id.* at 57, 146-147. She also testified that ICERS has been working closely with Imperial County's County Counsel and Lead Counsel in reviewing documents and determining whether to become involved in the litigation. *See id.* at 78, 80. She also indicated that ICERS will stay informed of the progress of the litigation through County Counsel "who makes monthly presentations to keep the board informed of the progress of each of the litigations." *Id.* at 183. She further testified that it would be one of ICERS' responsibilities to ensure that plaintiffs' claims are diligently prosecuted in the action. *Id.* at 184. Most critically, Ms. McFetridge testified that ICERS clearly understands and accepts its obligations as a class representative.

> Q: Do you have any understanding of what your duties would be as a class representative?
>
> A: Yes, I do believe I do.
>
> Q: What are those duties?
>
> A: I need to represent the best interest of the class. I need to stay informed of what's going on, which I would be doing through my county counsel and the documentation he provides me and counsel, legal counsel. I'd be involved in decision making, if necessary, required to do that. I guess I would be involved in depositions or testifying on this level. That's my understanding.

Id. at 95-96.

Each of the proposed class representatives has clearly demonstrated its adequacy. These volunteer champions of the absent class have and will continue to zealously protect the class and work closely with Lead Counsel to obtain the best possible result for all persons injured in the Enron fiasco.

C. Arguments Regarding the Adequacy of the Proposed Class Representatives Are Without Merit

BAC and BAS argue the proposed representatives for the claims against BAC and BAS are inadequate.[8] Unsurprisingly, courts often view with skepticism the motives of defendants who feign concern over the well being of class members through a challenge to the "adequacy" or "typicality" of proposed representatives.

> [I]t is often the defendant, preferring not to be successfully sued by anyone, who supposedly undertakes to assist the court in determining whether a putative class should be certified. When it comes, for instance, to determining whether "the representative parties will fairly and adequately protect the interests of the class," ... it is a bit like permitting a fox, although with a pious countenance, to take charge of the chicken house.

Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, 657 F.2d 890, 895 (7th Cir. 1981). *See also Umbriac v. Am. Snacks, Inc.*, 388 F. Supp. 265, 275 (E.D. Pa. 1975); *Farber v. Pub. Serv. Co.*, No. 89-0456-JB, 1990 U.S. Dist. LEXIS 18376, at *5-*6 (D.N.M. Dec. 3, 1990). The hallmark of the adequacy inquiry is simply to ensure that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4).

The Fifth Circuit has recently articulated the adequacy test as a determination that the class representatives are willing and able to take an active role and control the litigation to protect the interests of absent class members, will pursue those interests through qualified counsel and do not suffer from any conflicts of interest with the class they seek to represent. *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 479-80 (5th Cir. 2001). Although defendants cite *Krim v. pcOrder.com Inc.*, 210 F.R.D. 581 (W.D. Tex. 2002), for the proposition that a lead plaintiff's understanding should not be limited to the knowledge he has obtained from his attorney, the

---

[8] *See* Memorandum of Law of Bank of America Corporation and Banc of America Securities LLC in Opposition to Lead Plaintiff's Amended Motion for Class Certification ("B of A Opp.") at 10-24.

"adequacy" test posited by the *Krim* court is actually quite lenient (*i.e.*, the lead plaintiff need only make himself "familiar with the case" and with the "'concept of a class action'"). *Id.* at 587. This lenient "familiarization" requirement was not satisfied in *Krim* only because the lead plaintiff's lack of knowledge was especially egregious (*e.g.*, one lead plaintiff was completely unaware that he was representing the class, not just his own interests; and, another lead plaintiff had yet to meet one of his attorneys and failed to mention that he represented other class members).

Defendants BAC and BAS do not dispute the qualifications of counsel nor do they argue that ICERS, Teamsters 175 & 505 and Nathaniel Pulsifer's interests are antagonistic to those of the class. Yet, BAC and BAS assert that ICERS, Teamsters 175 & 505 and Mr. Pulsifer would not adequately protect the interests of the class.[9]

BAC and BAS fault these three proposed representatives for not having a lawyer's understanding of what is, undoubtedly, one of the most factually complex securities frauds in the history of the American public markets. But class representatives are entitled to rely upon counsel for investigation and strategy. *Berger*, 257 F.3d at 483. An inability to name all 90+ defendants in a factually complex case such as the present one in no way implies that the plaintiff's "'participation is so minimal that they virtually have abdicated to their attorneys the conduct of the case.'" *Butterworth v. Quick & Reilly,* 171 F.R.D. 319, 322 (M.D. Fla. 1997) (quoting *Kirkpatrick v. J.C. Bradford & Co.,* 827 F.2d 718, 728 (11th Cir. 1987)). Here, unlike in *Butterworth,* where the plaintiff was completely "unfamiliar[] with the facts and essential elements of the case," proposed

---

[9] In *In re Goldchip Funding Co.,* 61 F.R.D. 592 (M.D. Pa. 1974), a case relied upon by BAC and BAS for the proposition that an attorney may not have "unfettered discretion" in class actions, the court is careful to point out that "[e]ven unknowledgeable and inexperienced Plaintiffs" may meet the Rule 23 requirements by "demonstrating keen interest in the progress and outcome of the litigation." *Id.* at 595. Additionally, the *Goldchip* court does not hold that the plaintiffs are inadequate; it simply holds that it was not presented with enough information to determine whether plaintiffs are adequate class representatives.

class representatives' participation has not been "minimal," and it has not "abdicated" its rights to the attorneys representing it. 171 F.R.D. at 323. Additionally, although defendants cite *Rolex Employees Ret. Trust v. Mentor Graphics Corp.*, 136 F.R.D. 658, 666 (D. Or. 1991), as a case where the plaintiff was deemed to be inadequate because he "contributed nothing to the drafting of the complaint," this was only one factor, among many, that the court considered in determining that the plaintiff was inadequate. *Id.* In fact, the court held only when a plaintiff's testimony reveals that he is "'startlingly unfamiliar'" with the case, shall he be deemed an inadequate representative. *Id.* at 665. Class representatives need not be legal scholars. *Berger*, 257 F.3d at 483.

While the ***legal*** issues for the most part are routine (misstatements and omissions, liability under §§11 and 12, insider trading), the sheer number of parties and claims is daunting. These proposed representatives (indeed all proposed class representatives) have demonstrated a willingness to zealously protect the interests of the class. *Levine v. Berg,* 79 F.R.D. 95 (S.D.N.Y. 1978), a case in which the lead plaintiff was "unable to recall ***any*** of the facts and circumstances prompting her acquisition of [her] shares" and was only "vaguely cognizant" of the nature of defendant's business, differs from the present action because unfamiliarity with matters relating to his claim cannot be said to "permeate" plaintiff's entire testimony. *Id.* at 97.

IV. COMMON ISSUES PREDOMINATE

A. Plaintiffs May Rely on the Fraud-on-the-Market Presumption

The Financial Institutions' primary argument is plaintiffs cannot rely on the fraud-on-the-market presumption because Enron is not a "typical" securities fraud case. Financial Institutions' Opp. at 6-14. Plaintiffs' case, the argument goes, cannot be certified as a class action because the conduct for which plaintiffs seek to hold the Financial Institutions liable was not conveyed to the market and was generally unknown to investors at the time of their investment. Only Enron or

others that "made public statements" to the market, they argue, could have affected plaintiffs' investment decisions.

The Financial Institutions' argument defies logic and is flatly contradicted by overwhelming authority to the contrary.[10] Moreover, the Financial Institutions conveniently neglect the fact that analyst reports by the banks were, without question, "public statements to the market." Additionally, this court has ***already*** endorsed the common sense proposition that the fraud-on-the-market presumption applies in this case. *See Enron*, 235 F. Supp. 2d at 693 ("Reliance under prongs (a) and (c) can also be established by the fraud-on-the-market doctrine ...."). Add to this the fact that the Financial Institutions enabled Enron's fraudulent scheme that ***directly*** resulted in the false financial statements which dramatically and unequivocally affected the market price of Enron's securities.

Even if the fraud-on-the-market presumption did not apply (and it does), "[i]ndividual questions of reliance are ... not an impediment" to class certification. *Blackie*, 524 F.2d at 905; *Kirkpatrick*, 827 F.2d at 724-25 ("the mere presence of the factual issue of individual reliance could not render the claims unsuitable for class treatment" where "the complaint[] alleges 'a single ... fraudulent scheme'"); *In re Ramtek Sec. Litig.*, No. C 88 20195 RPA, 1990 U.S. Dist. LEXIS 14947, at *11 (N.D. Cal. Sept. 7, 1990) (issues of individual reliance "'are not grounds for refusing to permit an action to proceed as a class action'"). Indeed, a "court's rejection of the fraud-on-the-market theory as a basis for class action treatment ... [is] an inappropriate inquiry into the merits of

---

[10] Defendants' conclusion that "the Court's inquiry into the merits of Lead Plaintiff's lawsuit is more rigorous during the class certification stage than during the motion to dismiss stage" is unsupported by *Stirman*. Financial Institutions' Opp. at 14 n.7. Although the district court in that case found plaintiffs met the requirements of Rule 23(a) for class certification, the court "called for an evidentiary hearing on whether class certification was appropriate given the different state laws that could apply." *Stirman v. Exxon Corp.*, 280 F.3d 554, 559 (5th Cir. 2002). ***Never*** did the court address or compare a class certification inquiry to the inquiry of a court at the motion to dismiss stage. *See* Financial Institutions' Opp. at 14 n.7.

plaintiffs' claims." *Kirkpatrick*, 827 F.2d at 722. Importantly, issues of reliance and whether defendants can rebut the presumption of reliance are matters for ***trial***. *Kalodner v. Michaels Stores*, 172 F.R.D. 200, 206 n.6 (N.D. Tex. 1997).

Moreover, all Enron securities traded on an efficient market.[11] The so-called "*Binder*" factors which guide courts in determining whether an efficient market exists, are all present here. The "*Binder*" factors are: "(1) the trading volume; (2) the number of securities analysts covering the stock; (3) the presence and number of 'market makers'; (4) whether SEC Form S-3 Registration Statements are filed; and (5) rapid reaction of the stock price to public releases of information." *Griffin v. GK Intelligent Sys.*, 196 F.R.D. 298, 303 (S.D. Tex. 2000); *Binder v. Gillespie*, 184 F.3d 1059, 1065 (9th Cir. 1999).

Enron's and Enron-related entities' publicly traded securities all traded in an efficient market, as publicly available information about the Company was quickly incorporated into the price for these securities. *See* Ex. 3 (charts demonstrating price movement of Enron notes). Enron's common stock, preferred stock and certain debt securities were all traded on (among other exchanges) the New York Stock Exchange. By proxy, the prices of Enron's and Enron-related entities' publicly traded securities not traded on that exchange closely approximated movements in the Company's NYSE benchmark securities.

As detailed in the Amended Complaint and described in the Court's December 20, 2002 Opinion and Order, there were a multitude of securities analysts covering Enron securities during the

---

[11] Certain Defendants and the Financial Institutions have questioned only the efficiency of the market in Enron debt. *See* Financial Financial Institutions' Opp. at 36; Certain Defendants' Opp. at 6.

Class Period.[12] Moreover, Enron was eligible to file, and did file, SEC Form S-3 Registration Statements. Furthermore, Enron had market makers and "'millions of shares changing hands daily.'" *Griffin*, 196 F.R.D. at 303 (quoting *Basic*, 485 U.S. at 243); *see* Ex. 4 (brokers and/or market makers for Enron U.S. debt issues during Class Period); *see also infra* §IX. (noting Enron's average trading volume was 4,967,622 shares per day). Thus, the five *Binder* factors are definitively met in this case.

1. The Fraud-on-the-Market Presumption and Its Application Here

"To satisfy the reliance element in [a] §10(b) and Rule 10b-5 securities violation action, where a plaintiff investor who may not have read or heard the purported misrepresentation, a plaintiff may employ the 'fraud-on-the-market' doctrine." *Enron*, 235 F. Supp. 2d at 574. The presumption arose:

> [A]s a practical response to the difficulties of proving direct reliance in the context of modern securities markets, where impersonal trading rather than a face-to-face transaction is the norm. With the presumption, a plaintiff need not prove that she read or hear the misrepresentation that underlies her securities claim. Rather, she is presumed to have relied on the misrepresentation by virtue of her reliance on a market that fully digests all available material information about a security and incorporates it into the security's price.

WorldCom, Order at 47-48 (citing *Basic*, 485 U.S. at 243-44).

As Judge Cote noted in *WorldCom*, "[t]he market in effect acts as the agent of the investor, informing her that 'given all the information available to it, the value of the stock is worth the market price.'" Order at 48 (quoting *Basic*, 485 U.S. at 244). This Court has already noted the "fraud-on-the-market theory is particularly relevant where a §10(b) and Rule 10b-5 case alleges market

---

[12] As detailed in the Amended Complaint, numerous securities analysts followed Enron. *See, e.g.*, ¶¶127, 130-133, 142-143, 146-154, 158-159, 161-163, 166-172, 176, 180-186, 190-191, 193-195 (detailing analyst reports from 1998-1999); *see also* Ex. 2 (chart detailing credit rating agencies coverage of Enron notes).

manipulation." *Enron*, 235 F. Supp. 2d at 574. This is because such "'schemes which are intended to distort the price of a security, if successful, necessarily defraud investors who purchase the security in reliance on the market's integrity.'" *Id.* at 574 (quoting *Scone Inv. L.P. v. Am. Third Mkt. Corp.*, No. 97 Civ. 3802 (SAS), 1998 U.S. Dist. LEXIS 5903, at *16 (S.D.N.Y. Apr. 27, 1998)). Further, the Court has recognized the presumption applies in an action "under prongs (a) and (c)." *Enron*, 235 F. Supp. 2d at 693. Defendants' cases are not to the contrary. Those claims that ***do*** require proof of individual reliance may not qualify for class treatment because of the fear that common questions would be overwhelmed by individual issues. *See, e.g., Sandwich Chef v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 219 (5th Cir. 2003) (in a RICO action involving thousands of policyholders over a 14-year period, court noted "***the pervasive issues of individual reliance that generally exist in RICO fraud actions create a working presumption against class certification***"); *see also Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (in a case seeking class treatment for all nicotine dependent smokers since 1943, the Fifth Circuit reversed and remanded noting where individual reliance will be an issue, a fraud class action cannot be certified). Here, as detailed more fully below, individual reliance is ***not*** an issue.

The Financial Institutions argue the conduct for which plaintiffs seek to hold them liable "was ***not*** conveyed to the market." Financial Institutions' Opp. at 9 (emphasis in original). Nonsense. "Whether that alleged conduct" they argue "took the form of investing in the LJM Partnerships, structuring a transaction with Enron or lending money to Enron, that conduct was generally unknown to investors and the market." Financial Institutions' Opp. at 9. In essence, the banks appear to argue that because their fraud was clever and complex, no remedy should exist.[13]

---

[13] The Financial Institutions' theory that their fraud was hidden from the market would apply equally to an individual who read every false statement resulting from the fraud. Thus, their theory would deny recovery to an individual or an institution who read the false statements.

The banks' argument can find no support in law or logic. It is also clearly contrary to the policy of the securities laws. "The acts reach complex fraudulent schemes as well as lesser misrepresentations or omissions." *Shores v. Sklar*, 647 F.2d 462, 470 (5th Cir. 1981).

Similar arguments were floated by defendants – and rejected by the Court – in *ACC/Lincoln*. That case, as Lead Plaintiff noted in its opening brief, shares a number of distinct similarities with the Enron fiasco. Claims under §§10b, 11, 12, RICO and various state law claims were brought against the company, officers, directors, lawyers, accountants and others. After a class had been certified, defendants sought decertification. As here, the complaint laid out a "far-reaching plait of deceit." *In re American Continental Corp./Lincoln Savings & Loan Sec. Litig.*, 140 F.R.D. 425, 427 (D. Ariz. 1992). Defendants argued individual issues of reliance predominated and claimed the fraud-on-the-market presumption did not apply because part of the fraud was accomplished through oral sales pitches. The court's reasoning in holding certification was proper is instructive:

> [T]he gravamen of the alleged fraud is not limited to the specific misrepresentations made to bond purchasers. The allegation is of a whole roster of deception designed to contrive a false image of ACC/Lincoln.... Sham accounting alleged enable Defendants to mask ACC/Lincoln's weaknesses, while substantially skewing its worth.... The exact wording of the oral misrepresentations, therefore, is not the predominate issue. It is the underlying scheme which demands attention. Each plaintiff is similarly situated with respect to it, and it would be folly to force each bond purchaser to prove the nucleus of the alleged fraud again and again.

Id. at 431. The *ACC/Lincoln* court also noted why the reliance presumption applied with special force in a scheme case. "If an enterprise is so laden with fraud that its entire public image is distorted, it is sensible to presume that reasonable investors relied on many material misrepresentations which, in aggregate, created a false image." *Id.* at 432.

Even more fundamentally, defendants simply misunderstand the nature of the fraud pled against them. In addition to the allegations regarding deceptive devices and contrivances or participation in a scheme, the complaint pleads, and the Court found, the Financial Institutions and V&E ***made*** numerous, material misrepresentations. *See, e.g., Enron*, 235 F. Supp. 2d at 698

(discussing Citigroup); *id.* at 701 (discussing CSFB); *id.* at 702 (discussing CIBC); *id.* at 704 (discussing V&E). The fact that the complaint names various entities, involved in numerous fraudulent transactions, does nothing to minimize the utility of the fraud-on-the-market presumption in this case.

Defendants seek to draw the Court's attention away from the central core of common questions around which the entire case orbits. They reach for supposed differences among various purchasers based on what information each person may have considered when buying Enron securities. But what information any proposed class member relied on in purchasing Enron securities is not a concern at the class certification stage where (like here) plaintiffs have alleged a common scheme to defraud throughout the class period. 7 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* §22:26 (4th ed. 2002); *see also In re Baldwin-United Corp. Litig.*, 122 F.R.D. 424, 426-28 (S.D.N.Y. 1986) (changes regarding the amount and type of information available to the public throughout the class period do not defeat typicality in a securities fraud action); *Lewis v. Capital Mortg. Inv.*, 78 F.R.D. 295, 304 (D. Md. 1977) (it is well established that a class action is appropriate in securities fraud cases even if different misrepresentations occurred at different times). Thus, because plaintiffs have alleged a common scheme to defraud through the class period, it makes no difference which false or misleading statement or omission any proposed class member relied on.

Here, plaintiffs allege a common scheme to defraud, not "many separate allegedly fraudulent schemes," as defendants contend. Certain Defendants' Opp. at 7. In fact, each of the supposedly "separate schemes" are actually part of a single fraudulent scheme by defendants to falsify Enron's financial results. *Id.*

In support of this argument, Certain Defendants contend plaintiffs have actually alleged seven "divergent and wide-ranging schemes." *Id.* However, a cursory review of each of defendants'

seven bullet points reveals that each is actually part of the single fraudulent scheme to falsify Enron's financial results. *Id.* For example, in their first bullet point defendants argue that plaintiffs contend "Defendants engaged in a series of transactions, characterized by Plaintiffs as manipulative devices, between Enron and various partnerships and SPEs, which resulted in Enron ***inflating its reported financial results*** by more than a billion dollars." *Id.* (citing ¶¶21-35). And in another bullet point defendants' assert that plaintiffs contend "Defendants ***misrepresented the potential for success*** of Enron's new broadband business – EBS." *Id.* (citing ¶¶39-41). Next, defendants' argue that it is plaintiffs' contention "Enron ***improperly recognized*** $370 million in ***profits*** in connection with the New Power IPO." *Id.* (citing ¶¶42). And defendants assert that plaintiffs argue "Enron engaged in a series of transactions with certain of its banks in order to obtain 'disguised loans' that would help Enron present a ***misleading picture of its liquidity, financial condition, and balance sheet***." *Id.* (citing ¶¶44-47). In a further effort to "divide and conquer" Certain Defendants argue that because the complaint "separates the alleged fraudulent activity into at least seven distinct time periods," the class members "presumptively relied on different alleged misrepresentations." Certain Defendants' Opp. at 7-8. Plaintiffs drafted the complaint for the convenience of the Court and the parties and to satisfy the PSLRA's particularity requirements. That the complaint lays out defendants' fraudulent scheme in a coherent chronological order in no way affects the class certification analysis.

By taking one snippet from one deposition the Financial Institutions, like the Certain Defendants, attempt to focus the inquiry away from the overarching scheme pled in the complaint and try to ensnare the Court into consideration of minor (and meaningless) fine-line distinctions between class members. As its example of the supposed plague of problems, the Financial Institutions argue class certification is inappropriate because Mr. Speck testified that part of the reason he purchased Enron stock was Enron Broadband Services ("EBS"). Financial Institutions'

Opp. at 16. Additionally, the banks assert Mr. Speck "did not rely on Enron's financial statements, nor did he rely on anything the Financial Institution Defendants said or did." *Id.* The banks contend they did not have any involvement in EBS and, therefore, if they are tried together with other defendants who were involved in EBS "there is a real risk that the jury's deliberation about" the banks "will be unduly influenced by evidence concerning EBS." *Id.* at 17.[14] Not only is this isolated statement much ado about nothing, it is also not the full extent of Mr. Speck's testimony. Mr. Speck also testified that he "wasn't that familiar with the broadband itself," and that he was also basing his purchase of Enron on their "reputation of being a well-run company," and a "great firm" that "would know what they were doing." Ex. 20 at 39. In addition, Mr. Speck testified he bought Enron stock in reliance on the fact it "was making the money that was stated – that they stated they were making." *Id.* at 88. This, of course, is what all defrauded investors relied upon – the integrity of the market price.

The Financial Institutions argue that if the presumption of reliance under the fraud-on-the-market theory is applied, then "putative class members who have never even heard of the Financial Institution Defendants' actions, would be relieved from proving the element of reliance – essentially creating claims against the Financial Institution Defendants where none would otherwise exist." Financial Institutions' Opp. at 11. But this argument is circular. If plaintiffs knew about the banks' role in the Enron fraud, they surely would not have been lured into buying Enron securities. For

---

[14] The banks also conclusively state (without citing any authority) that "[c]urative jury instructions and special verdict forms cannot remedy this problem." Financial Institutions' Opp. at 18 n.10. The utility of jury instructions and the manner in which instructions, special verdict forms, questionnaires and other systems to streamline the trial process can remedy perceived problems will be, of course, a primary issue as the case nears trial. For now, it can be stated that plaintiffs are confident any number of safeguards can be put in place to ensure a fair trial. Moreover, the logical alternative, a separate trial regarding EBS, would be duplicative and wasteful. Furthermore, the PSLRA contemplates there will be one trial where the jury apportions culpability among defendants and others who caused plaintiffs' damages. 15 U.S.C. §78u-4(f).

"[w]ho would knowingly roll the dice in a crooked crap game?" *Schlanger v. Four-Phase Systems, Inc.*, 555 F. Supp. 535, 538 (S.D.N.Y. 1982). Indeed, numerous proposed class representatives testified to as much. For example, Stephen M. Smith testified as follows:

> Q. If you knew then what you know now about the facts that you claim were not disclosed, what would you have done? And I'm referring to the time when you purchased your Enron shares. Would you – would you still have gone ahead and purchased the shares?
>
> * * *
>
> Q. If you knew then what you know now about what you claim was undisclosed.
>
> A. No. I wouldn't have bought them.

Ex. 31 at 193.

Similarly, John Zegarski testified that if he had known about the fraud alleged in the complaint when he purchased his Enron stock he would not have done so. "Absolutely not." Ex. 19 at 191. Ben Schuette also made clear why the fraud-on-the-market presumption is available here.

> Q. Had you known all the facts of Enron that you claim were not disclosed, what would you have done?
>
> A. If I knew all the facts as they are I wouldn't have bought the stock.

Ex. 21 at 142. Mervin Schwartz also clearly testified that had the fraud been revealed, he would not have invested.

> Q. Given given what you know now, did you pay too much for that stock?
>
> * * *
>
> A. What I know now .... I would have never bought the stock.

Ex. 30 at 195. *See also* Ex. 18 at 189 (noting that had there been disclosures regarding the fraud it would have changed Michael Henning's decision to purchase Enron). These representatives demonstrate in a concrete way, how and why the fraud-on-the-market presumption works in the real world. Any investor, had she known of the swaps, SPEs, off-book partnerships and other devices

used by the banks and others which falsified Enron's financial statements, would not have purchased Enron's securities.

There is no requirement that the plaintiffs state with authority at class certification the exact name of the person on whom they relied. The Financial Institutions posit the fraud-on-the-market presumption would be applicable in a "typical" case, noting "[i]f this were a suit against Enron – the maker of all the allegedly false and misleading statements – Lead Plaintiff's argument would be understandable." Financial Institutions' Opp. at 9. Notwithstanding the fact the banks did make false and misleading statements, under the banks' version of the law, the fraud-on-the-market presumption would be inapplicable against Enron if plaintiffs could not pinpoint the exact person, in the finance department, for example, who falsified financial statements. The fact that proposed representatives could not pinpoint the lies made to them by the banks, does nothing to negate the applicability of the fraud-on-the-market presumption. Indeed, it is why the presumption exists.

Defendants point to testimony of proposed class representatives which they claim demonstrates that it is not appropriate to presume class members "relied upon the non-public conduct" of the banks. *Id.* at 12-13. If the conduct was non-public, however, how could plaintiffs have known about it? Moreover, the fraud-on-the-market presumption deals with the integrity of the market price. "An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price." *Basic*, 485 U.S. at 247. If the banks' role in the Enron fraud were fully disclosed, the market price would have quickly absorbed that information and driven the price of the securities downward.

Defendants put words in the mouth of proposed class representative Dr. Fitzhugh Mayo, in a useless effort to demonstrate that contrary to established law, plaintiffs in this case must be able to pinpoint the exact source of false and misleading statements upon which they relied. Financial Institutions' Opp. at 13. Dr. Mayo's testimony, when read in full, accurately depicts him as one who

(like the rest of the class) relied on the integrity of Enron's market price. *See* Ex. 24 at 48-50. The portion of testimony defendants quote is actually that of defense counsel, the exchange was as follows:

> Q. If we shift gears, do you claim that you've been injured through the actions of the Financial Institutions in particular?
>
> A. Not in particular, no.
>
> Q. And what is it specifically that you claim that the Financial Institutions did or – or didn't do?
>
> A. I – I understand that they enabled the off-balance-sheet transactions that took place in Enron.

Id. at 153.

The Financial Institutions' arguments reveal that they have largely ignored the allegations of the Amended Complaint when they say that "the specific conduct for which plaintiffs seek to hold the [Financial Institution] Defendants liable was ***not*** conveyed to the market." Financial Institutions' Opp. at 9 (emphasis in original). They ignore the fact that the Financial Institutions' conduct was conveyed to the market through their analysts, and through their conduct and participation in the scheme that resulted in Enron's false financial statements.

Although they propose plaintiffs will rely on *Shores* and *Finkel* in response to their argument, what they truly seek to do is attempt to convince the court that these cases are inapplicable, even though they both support the holding that fraud-on-the-market applies to allegations of a scheme to defraud. Financial Institutions' Opp. at 10 n.3; *Shores*, 647 F.2d 462; *Finkel v. Docutel/Olivetti Corp.*, 817 F.2d 356 (5th Cir. 1987). Indeed, *Shores* is applicable to the instant case in ways the Financial Institutions seek to avoid. Although in that case the Fifth Circuit did not specifically consider whether fraud-on-the-market was applicable to schemes to defraud, the Fifth Circuit nonetheless found that "the plaintiff's allegations state a claim of fraud so pervasive that the absence of reliance was not dispositive of the case." *Shores*, 610 F.2d at 237.

As the court noted in *Shores*, "[t]he scheme to float the bond issue was the cause in fact of plaintiff's losses, for if the defendants had not engaged in the fraudulent behavior, the bond would never have been offered for sale, plaintiff could not have purchased it, and no loss would have resulted." *Id.* at 240. Likewise, the Financial Institutions' scheme to cover up Enron's extremely precarious and shattered financial situation, as well as the ongoing fraud, caused plaintiffs' losses.

The *Finkel* case, of course, is entirely applicable. It holds that when the securities at issue were purchased in the open market, the fraud on the market theory applies in Rule 10b-5 securities fraud cases. 817 F.2d at 357. Therefore, "proof of reliance on specific misconduct in the purchase or sale of a security in the open market is not a requisite key to recovery." *Id.*

The Financial Institutions also claim that we may seek to rely on the *Affiliated Ute* reliance presumption as an "alternative" to the fraud on the market's reliance presumption, but argue it is inapplicable because plaintiffs did not specifically plead reliance on the defendants' material omissions in the complaint or in the motion to certify. Financial Institutions' Opp. at 11 n.4. This is inaccurate, as the plaintiffs certainly did allege reliance on the defendants' material omissions. *See, e.g.*, ¶¶991b, 995, 996.

As a last-ditch effort to cloud the waters, the banks point to testimony of Jeffrey Heil of The Regents to attempt to show that individual determinations of reliance are required. Financial Institutions' Opp. at 13 n.6. The banks claim non-public discussions with Enron executives subject The Regents to the unique defense that it did not rely on the banks when it purchased Enron stock. There is simply no merit to this assertion. There is no evidence The Regents learned of the massive undisclosed fraud when it met with Enron management. *WorldCom*, Order at 23. In *WorldCom*, the Court noted large institutional investors (such as The Regents here) "on occasion even [] communicate directly with the company." *Id.* at 24. The test is whether named plaintiff received

non-public information from a corporate officer.[15] Defendants' authority is inapposite. In *Firstplus,* the court declined to appoint one proposed representative (and certified the class) where the court found the proposed representative had received non-public information. 2002 U.S. Dist. LEXIS 20446, at *14-*16. And in *Grace v. Perception Tech. Corp.*, 128 F.R.D. 165, 169 (D. Mass. 1989), the court found two proposed class representatives to be atypical, not because they had non-public discussions with officers of the corporation, but because defendants had proven the proposed class representatives received information not generally available in the marketplace.

Courts have repeatedly held that where a plaintiff receives information privately that is consistent with the fraudulent public statements, the presumption of reliance is not rebutted and the plaintiff is not subject to unique defenses. *Hallet v. Li & Fung, Ltd.*, No. 95 Civ. 8917 (JSM), 1997 U.S. Dist. LEXIS 15509 (S.D.N.Y. Oct. 6, 1997). In *Hallet*, the court certified the proposed representative stating "the cases hold that if the plaintiff has received information from company insiders that confirms, reflects, repeats or even digests publicly available market information, that plaintiff is an appropriate class representative." *Id.* at *9. Here, there is simply no evidence anyone from The Regents learned anything in "private" conversations with Enron insiders that was at variance with what Enron was telling the market.

---

[15] Moreover, as the Court noted in its order regarding Lead Plaintiff's motion for a protective order, only when "unique defenses [] threaten to become the focus of the litigation" will a plaintiff be barred from serving as a class representative. *In re Enron Corp. Sec. Litig.*, No. 01-CV-3624, Order at 3 (S.D. Tex. Sept. 19, 2003). The Court stated it was "convinced that further development of facts surrounding the 1998 energy contract between the Regents and Enron Energy Services would not be fruitful for the class certification stage." *Id.* There is no threat that any purported unique defense will become the focus of the case.

2. Losing Arguments from the Motions to Dismiss Fail to Persuade

Rehashing failed arguments regarding *Central Bank*, defendants note in that case, the Supreme Court held aiding and abetting was not actionable under §10(b). In part, the Supreme Court held aiding and abetting liability was prohibited under the statute because it would allow plaintiffs to "circumvent the reliance requirement." *Central Bank N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 180 (1994). What defendants fail to acknowledge is this Court did not deny the motions to dismiss because it found the banks "aided and abetted." Rather, the Court held plaintiffs had stated a claim against the banks for ***directly*** violating the securities laws. This Court held:

> Lead Plaintiff alleges a scheme or course of business in which the various participant Defendants engaged in and concealed a pattern of conduct involving the creation of unlawful SPEs and utilizing fraudulent transactions with these entities having no economic purpose other than as contrivances or deceptive devices to misrepresent Enron's financial condition and defraud investors into continuing to pour money into Enron securities to keep the Ponzi scheme afloat and thereby enrich themselves in a variety of ways. It has also asserted that as part of this scheme, Defendants knowingly made material misrepresentations upon which investors in Enron securities relied. Moreover, the purchase of Enron securities by unknowing investors was an integral part of the scheme, necessary to keep the house of cards out of bankruptcy and to further a scheme so lucrative for Defendants.

Enron, 235 F. Supp. 2d at 693.

Defendants continue to raise arguments this Court has rejected in violation of the Court's orders. Financial Institutions' Opp. at 2, 9 (arguing liability under Rule 10b-5(a) and (c) is a "novel theory of liability [and] is inconsistent with *Central Bank* and its progeny"); *see also In re Enron Corp. Sec. Litig.*, No. H-01-3624, Scheduling Order at 4 (S.D. Tex. July 14, 2003) ("***counsel shall not reiterate allegations or arguments previously rejected by this Court in Rulings on motions to dismiss the consolidated complaints***") (emphasis in original). It should also be noted that after the Court's December 20, 2002 Opinion and Order numerous courts have concluded that liability under Rule 10b-5(a) and (c) ***is*** consistent with *Central Bank*. *See, e.g., Forslund v. Rein*, No. SACV-01-1085-GLT(ANx), 2003 U.S. Dist. LEXIS 16832, at *8-*9 (C.D. Cal. Sept. 8, 2003) ("A defendant

can violate Rule 10b-5 ... without ever making a materially false or misleading statement or omission."); *SEC v. Santos*, No. 02 C 8236, 2003 U.S. Dist. LEXIS 19806, at *4-*5 (N.D. Ill. Nov. 3, 2003) (allegations that individuals "participated in a 'scheme to defraud' and engaged in 'practices' that 'operated' to deceive ... satisfy the plain language of Rule 10b-5(a) and (c)"); *In re Lernout & Hauspie Sec. Litig.*, 236 F. Supp. 2d 161, 173 (D. Mass. 2003); *Rich v. Maidstone Fin.*, No. 98 Civ. 2569 (DAB), 2002 U.S. Dist. LEXIS 24510, at *22-*23 (S.D.N.Y. Dec. 19, 2002).

V&E also encourages the Court to disregard its prior order and "in ***this*** context" urges the Court to apply a "bright line" rule prohibiting a finding of primary liability under §10(b) unless the secondary actor itself is the identified author of a statement to investors. Vinson & Elkins L.L.P.'s Opposition to Class Certification ("V&E Opp.") at 6 (emphasis in original). Why the Court should reexamine its painstakingly detailed decision regarding liability of so-called secondary actors at this stage in the litigation is unfathomable. For "'[i]n determining the propriety of a class action, the question is not whether ... plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.'" *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). Thus, discussion of the proper "test" to determine whether a party is a primary violator is wholly inapt here. The time for that debate has long passed.

3. Vinson & Elkins' Arguments Regarding Reliance Lack Merit

Like the Financial Institutions, V&E also bases its motion on the supposed failure of the predominance requirement. In a retread of its failed motion to dismiss, V&E argues that individual issues of reliance destroy the predominance requirement. V&E claims the fraud-on-the-market presumption cannot apply to it because, in its view, "V&E did not communicate any statements –

allegedly misleading or otherwise – to the market." V&E Opp. at 6.[16] V&E is incorrect. As the Court previously held in denying V&E's motion to dismiss:

> [T]he complaint goes into great detail to demonstrate that Vinson & Elkins did not remain silent, but chose not once, but frequently, ***to make statements to the public about Enron's business and financial situation***.... Moreover in light of its alleged voluntary, essential, material, and deep involvement as a primary violator in the ongoing Ponzi scheme, ***Vinson & Elkins was not merely a drafter, but essentially a co-author of the documents it created for public consumption*** concealing its own and other participants' actions. Vinson & Elkins made the alleged fraudulent misrepresentations to potential investors, credit agencies, and banks, whose support was essential to the Ponzi scheme, and Vinson & Elkins deliberately or with severe recklessness directed those public statements toward them in order to influence those investors to purchase more securities, credit agencies to keep Enron's credit high, and banks to continue providing loans to keep the Ponzi scheme afloat. Therefore Vinson & Elkins had a duty to be accurate and truthful. Lead Plaintiff has alleged numerous inadequate disclosures by Vinson & Elkins that breached that duty.

Enron, 235 F. Supp. 2d at 705. The Court also noted numerous public statements drafted and/or approved by V&E. *See, e.g., id.* at 656-79.

Despite this, V&E insists the complaint "fails to identify even one misleading statement to the investing public made by, or attributed to, V&E." V&E Opp. at 5. This is purely wishful thinking on V&E's part. Just as the presumption of reliance under fraud-on-the-market applies to the Financial Institutions, the presumption applies with equal force to V&E.

As a corollary to its argument regarding reliance, V&E argues plaintiffs have failed to come forward with ***evidence*** to support its allegation that V&E drafted and/or approved various documents. Realizing its novel argument has no basis in law, V&E relies on a single inapposite case

---

[16] In arguing that individual reliance is a requirement for certification in this case, V&E incorrectly attempts to analogize the civil liability provisions of TILA and RICO to Rule 10b-5. *See* V&E Opp. at 4. The *Perrone v. GMAC*, 232 F.3d 433 (5th Cir. 2000), court distinguished TILA's reliance requirement for class certification from Rule 10b-5 which allows "an action for damages without proof of reliance for any material violation of Rule 10b-5." *Id.* at 439. Likewise, *Patterson v. Mobile Oil Corp.*, 241 F.3d 417 (5th Cir. 2001), is inapposite in that it does not address reliance in the context of a securities fraud action such as this where individual reliance is satisfied through the allegations of fraud-on-the-market and scheme.

to argue that ***by analogy*** plaintiffs must present evidence V&E was the "creator" of documents before the Court can properly allow plaintiffs to proceed under the fraud-on-the-market presumption. *See* V&E Opp. at 8 (citing *Griffin*, 196 F.R.D. 298). In *Griffin*, however, the court declined to certify a class because it found plaintiffs could not rely on the fraud-on-the-market presumption where plaintiffs failed to present evidence regarding the volume of shares traded. *Griffin*, 196 F.R.D. at 303.

4. Issues of Reliance Should Not Be Considered on a Motion for Class Certification

V&E and the Financial Institutions' argument that a class should not be certified because the fraud-on-the-market presumption of reliance does not apply also completely ignores the overwhelming body of case law holding issues of reliance should not be considered on a motion for class certification. As one Texas court noted:

> [R]endering a decision on whether the Plaintiffs will ultimately be able to rely successfully on the [fraud-on-the-market] presumption requires [the court] to prematurely consider the merits of the underlying action.
>
> * * *
>
> Even if [the defendants] ... can prove non-reliance to rebut the fraud-on-the-market presumption, this goes to the merits of the case and cannot be considered by the Court on a motion for class certification.

In re First Republicbank Sec. Litig., Civ. A. No. 3-88-0641-H, 1989 U.S. Dist. LEXIS 11139, at *27-*28 (N.D. Tex. Aug. 1, 1989); *see also Kalodner*, 172 F.R.D. at 205-06 n.6 ("reliance can be presumed at the class certification stage .... Defendants may rebut this presumption ***at trial***"); *Feinberg v. Hibernia Corp.*, No. 90-4245, 1992 U.S. Dist. LEXIS 10872, at *18 (E.D. La. July 14, 1992) ("[a]ny further inquiry into plaintiff's reliance goes to the merits of the case and will not be considered by this Court on a class certification motion") (citing *Eisen*, 417 U.S. at 177-78); *In re Pizza Time Theatre Sec. Litig.*, 112 F.R.D. 15, 22 (N.D. Cal. 1986) ("although lack of reliance may be a defense, that goes to the merits of the case and cannot be considered in a certification motion").

Indeed, a number of courts hold the "'determination of whether individual reliance will be a necessary element of the plaintiffs' claims or whether plaintiffs will be able to benefit from the presumptive reliance of the fraud-on-the-market theory ***is itself a question that is common and typical of the entire class.***'" *Feinberg*, 1992 U.S. Dist. LEXIS 10872, at *17-*18 (quoting *In re Western Union Sec. Litig.*, 120 F.R.D. 629, 634 (D.N.J. 1988)).

Finally, even if reliance were required and defendants' argument somehow demonstrated non-reliance (neither of which are true), "the defense of non-reliance is not a basis for denial of class certification." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992).

5. The "In Connection with" Requirement Is Undoubtedly Met

Hoping if they throw enough darts at the wall, one will hit the mark, defendants suggest the "in connection with the purchase or sale of any security" requirement is not satisfied on a classwide basis. Financial Institutions' Opp. at 11. As this Court has noted, "the phrase 'in connection with the purchase or sale of any security' must be construed broadly and flexibly to effectuate Congress' remedial goal in enacting the statute of insuring honest securities markets and promoting investor confidence." *Enron*, 235 F. Supp. 2d at 693 (citing *United States v. O'Hagan*, 521 U.S. 642 (1997); *SEC v. Zandford*, 535 U.S. at 813, 819 (2002)).

Relying on an out-of-context snippet from the court's recent order in the *Tittle* case, defendants argue the requisite nexus to satisfy the in connection requirement is not met. In *Tittle*, the Court noted: "[T]he fraud may be "in connection with" the securities purchases or sales if the fraud 'coincides' with those transactions." *In re Enron Corp. Sec. Litig*, No. H-01-3913, 2003 U.S. Dist. LEXIS 17492, at *314 n.125 (S.D. Tex. Sept. 30, 2003). That is precisely what plaintiffs in *Newby* have pled. Defendants' argument regarding the "in connection with" requirement is without merit.

6. Certain Defendants' Arguments Regarding "Material Variations" Should Be Disregarded

Certain Defendants claim that plaintiffs do not dispute the fact that material variation in the alleged misrepresentations "defeats class certification under the controlling Fifth Circuit precedent." Certain Defendants' Opp. at 6. Defendants, however, do not – and cannot – cite to any support for their statement. Not only is that statement patently wrong and unsupportable, the cases cited by the defendants are distinguishable and not controlling, particularly because it is well-settled that plaintiffs are entitled to avail themselves of the fraud-on-the-market presumption of reliance. Moreover, there is nothing relevant to class certification about the fact that certain of the alleged misrepresentations were oral, as the action is not substantially based on oral misrepresentations.

Defendants rely on a 30-year old case, *Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880 (5th Cir. 1973), for their proposition that non-uniform misrepresentations preclude class certification here, but that case is limited to its facts and does not support defendants' argument in this fraud-on-the-market case. In *Simon*, the Fifth Circuit stated in *dicta* that "[i]f there is any material variation in the representations made or in the degrees of reliance thereupon, a fraud case ***may be*** unsuited for treatment as a class action." *Id.* at 882. In *Rifkin v. Crow*, 574 F.2d 256 (5th Cir. 1978), the same judge who decided and wrote *Simon*, Fifth Circuit Judge Roney, indicated that the *Simon* case should be limited to its facts. *Id.* at 261. ***The Fifth Circuit also held in Rifkin that the Simon case "would be inapplicable" to cases premised on "a 'fraud on the market' theory," such as the instant case.*** *Id.* at 263 (noting that a plaintiff does not need to show individual reliance upon "the particular misrepresentations or omissions made by a defendant" when relying on the fraud-on-the-market presumption of reliance).

Numerous courts in the Fifth Circuit have granted class certification in cases similarly alleging a scheme to defraud that involved different types of misrepresentations and omissions during long class periods. *See, e.g., Rubenstein v. Collins,* 162 F.R.D. 534 (S.D. Tex. 1995)

(certifying large class over almost two year period in case involving scheme to defraud); *In re LTV Sec. Litig.*, 88 F.R.D. 134, 144 (N.D. Tex. 1980) (certifying large class over three year period in case involving complex scheme to defraud and holding that "[t]he fraud on the market theory does not eliminate the element of reliance but places it where in open market transactions it realistically belongs – ***connecting the purchaser to the market, not the specific misstatement***"); *Hill v. Galaxy Telecomm.*, 184 F.R.D. 82 (N.D. Miss. 1999) (certifying large class over undefined period of time in fraud action based on scheme to defraud).[17]

In the *LTV* case, the securities claims (under §10 of the 1934 Act and §§11 and 12 of the 1933 Act), were brought by class representatives who bought numerous different types of securities based on a number of misrepresentations and omissions over a three-year period. 88 F.R.D. at 138-45. Although the claims were all different, the substantive allegations were "commonly threaded" together by an alleged scheme to defraud, just as in this case. There, as here, the class was large – at least 100,000 putative class members involving over 39,000 transactions of LTV common stock alone. The court in *LTV* certified this single class, and disregarded the same arguments made by defendants here, holding that: (1) plaintiffs are not required to show individual reliance, but can rely on the presumption of reliance under the fraud-on-the-market theory, if reliance is required to be proven with respect to that particular plaintiff's claims; (2) notwithstanding the number of plaintiffs, the different types and classes of securities at issue, or the fact that §§10, 11 and 12 have different proof requirements, there is a predominance of common issues, given that the substantive allegations for all claims are commonly threaded together by the allegations of a scheme to defraud; and

---

[17] Of course, there are plenty of Fifth Circuit district courts that granted class certification in securities fraud actions. *See, e.g., Dartley v. ErgoBilt, Inc.*, No. 3:98-CV-1442-M, 2002 U.S. Dist. LEXIS 23359 (N.D. Tex. Dec. 4, 2002); *Firstplus*, 2002 U.S. Dist. 20446 (N.D. Tex. Oct. 23, 2002); *Kalodner*, 172 F.R.D. 200; *Teichler v. DSC Communications Corp.*, No. CA3-85-2005-T, 1988 U.S. Dist. LEXIS 16448 (N.D. Tex. Apr. 15, 1988); *Keasler*, 84 F.R.D. 364.

(3) having individual trials would be ridiculous, in light of all this, as "the specter of thousands of mini-trials of the reliance question and damage amount would then not now seem sufficiently palpable to override the economies of a single trial." *Id.* at 142.

Defendants also cite *Simon* in support of their statement that "[t]he Fifth Circuit agreed with several courts that had previously held that an action based substantially on oral rather than written misrepresentations cannot be maintained as a class action." Certain Defendants' Opp. at 5. But this is not the case here. Plaintiffs' action ***is not*** substantially based on oral rather than written misrepresentations. And, in any event, the oral statements at issue here were communicated to the market. Because plaintiffs' allegations concern a complex scheme to defraud and they are entitled to the fraud-on-the-market theory's reliance presumption, proper focus at class certification should not be on isolating certain misrepresentations in a vacuum or on plaintiffs' individual reliance on certain misrepresentations, whether oral or written. *See Basic,* 485 U.S. at 242 (holding that fraud on the market theory's presumption of reliance is key in class actions because "[r]equiring proof of individualized reliance from each member of the proposed plaintiff class effectively would ... prevent[] plaintiffs from proceeding with a class action, since individual issues then would have overwhelmed the common ones"); *Robertson v. Strassner*, 32 F. Supp. 2d 443, 449 (S.D. Tex. 1998) ("Plaintiffs have alleged facts supporting the reliance element of their securities fraud claim by alleging a fraud on the market ... [a]s a result, they need not prove individual reliance."); *Teichler*, 1998 U.S. Dist. LEXIS 16448, at *9 (holding that because "it is appropriate in this case to apply a presumption of reliance supported by the fraud on the market theory ... the issue of individual reliance in this case does not preclude certification).

Contrary to Certain Defendants' inference on page 12 of their brief, the Fifth Circuit is not opposed to affirming class certification decisions when it actually has the occasion to consider a class certification appeal. *See, e.g., Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290 (5th Cir.

2001) (affirming class certification); *Mullen v. Treasure Chest Casino, L.L.C.*, 186 F.3d 620 (5th Cir. 1999) (affirming class certification); *Lightbourn v. County of El Paso*, 118 F.3d 421 (5th Cir. 1997) (court did not abuse its discretion in granting class certification); *In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996) (affirming class certification where abuse of discretion not established); *Mitchell v. Johnston*, 701 F.2d 337, 344 (5th Cir. 1983) (affirming class certification).

The defendants only cite *Castano* as the one case that "reiterated the principles announced in *Simon*," but that case is so factually and legally distinguishable that it should be disregarded. *Castano* did not involve violations of the securities laws but instead "involved mass tort claims for personal injuries, economic losses, emotional distress, and wanton or reckless conduct under the varying laws of the fifty states." *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 202 F.R.D. 484, 499 (S.D. Tex. 2001). In that context, the Fifth Circuit observed that in multi-state class actions, "variations in state law may swamp any common issues and defeat predominance." *Castano*, 84 F.3d at 741.

The Fifth Circuit has indicated that the *Castano* holding on predominance should be limited to the facts of that case. *See Mullen*, 186 F.3d at 626-27 (finding that in *Castano* "a putative class of addicted smokers did not meet the predominance requirement because there were complex choice-of-law issues and the case involved novel addiction-as-injury claims with no track record from which a court could determine which issues were 'significant'").[18] Indeed, the Eastern District of

---

[18] Citing *Castano*'s principle of "judicial efficiency," however, the Fifth Circuit also held recently in *Mullen* that Rule 23(b)(3)'s superiority element is satisfied "[w]here the class jury and the individual juries must consider similar issues, it is likely that evidence presented at the class trial will be repeated during the individual trials. As we have noted, 'the net result may be a waste, not a savings, in judicial resources.'" *Mullen*, 186 F.3d at 632 (citing *Castano*, 84 F.3d at 749). Here, too, the superiority element is satisfied for reasons of judicial efficiency. It would be a waste of judicial resources, money and time to have more than a single jury decide this case.

Texas recently distinguished *Castano* and limited its holding on predominance to its facts, while noting that class certification in securities cases is the norm:

> The United States Supreme Court recently said that predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 594, [] (1997). As the Fifth Circuit noted in [*Mullen*], the class proposed in *Amchem* was too diverse to proceed. The asbestos claimants who formed the *Amchem* class were exposed to different products from different sources over different time periods. Some claimants had full-blown diseases; others were asymptomatic. Conflict-of-law issues were torturous because class members came from many states. *See* [*Mullen*], 186 F.3d at 626 (explaining and distinguishing *Amchem*). Similar concerns led the Fifth Circuit to revoke the class certification in *Castano* ... a cigarette case. *See* [*Mullen*], 186 F.3d at 626-27 (explaining and distinguishing *Castano*).
>
> The case now before the Court looks far more like [*Mullen*] than *Amchem* or *Castano*. There are no latent injuries or personal injuries at issue. There are no choice-of-law problems.... Here, there are economic losses, not personal injury claims. Courts have been reluctant to certify personal injury classes but have consistently certified classes involving economic harms. ***Class certification in securities cases is practically routine***. *See* T. Willging, *et al.*, *Empirical Study of Class Actions in Four District Courts: Final Report to the Advisory Committee on Civil Rules 17* (Federal Judicial Center 1996) (***reporting class certification rates in securities cases ranging from 94% to 100%***).

Shaw v. Toshiba Am. Info. Sys., 91 F. Supp. 2d 942, 957-58 (E.D. Tex. 2000).

Defendants also cite *King v. Sharp*, 63 F.R.D. 60, 66 (N.D. Tex. 1974), as support for their statement that even if the plaintiffs are entitled to the fraud-on-the-market theory's presumption of reliance, "the various class members all purchased and sold their stock at different times during the three-year class period and, therefore, presumptively relied on different alleged misrepresentations, which would potentially subject different groups of Defendants to liability."[19] Certain Defendants'

---

[19] By ignoring the totality of the plaintiffs' allegations, Certain Defendants attempt to argue that, according to the Amended Complaint, they committed several frauds-on-the-market that are separated into "at least" seven distinct periods. Certain Defendants' Opp. at 7. Apparently, Certain Defendants seek to avoid class certification by arguing that their scheme is just too complex. Clearly, this is an action involving an unprecedented scheme to defraud, but nonetheless, boiled down to its essence, plaintiffs have alleged one complex scheme to defraud that occurred over the entire class period.

Opp. at 8. Their reliance on *King* is misplaced. *King* concerned class issues not present here. At issue in the *King* case was whether a trustee of a bankrupt company had standing to collect money on behalf of third parties, whether the trustee had a conflict of interest with the purported class; and whether an intervener could be considered a "purchaser" under Rule 10b-5. *King*, 63 F.R.D. at 62-66. The court did not even consider whether the fraud-on-the-market theory's presumption of reliance supported a class consisting of class members that bought and sold their stock at different times – an issue that Certain Defendants raise in their opposition. *Id.* Additionally, "[t]he simultaneous presence of a group of persons who bought stock before the price of the stock went down, and a group of persons who bought stock after the price of the stock went down does not preclude them from being part of the same class for class action purposes." *See Rubenstein*, 162 F.R.D. at 538; *see also LTV*, 88 F.R.D. at 149.

Moreover, it is well-settled in a fraud-on-the-market case, individual issues of reliance do not predominate. *See, e.g., Basic*, 485 U.S. at 242 (fraud-on-the-market theory's presumption of reliance precludes analysis of individual reliance issues); *First Republicbank*, 1989 U.S. Dist. LEXIS 11139, at *28 ("the fraud-on-the-market theory was developed to enable plaintiffs to maintain class actions for alleged Rule 10b-5 violations and the presence of individual questions of reliance does not mean that individual questions automatically predominate"); *Teichler*, 1988 U.S. Dist. LEXIS 16448, at *9 (holding that because "it is appropriate in this case to apply a presumption of reliance supported by the fraud on the market theory ... the issue of individual reliance in this case does not preclude certification"); *see also In re Tyson Foods Sec. Litig.*, No. 01-425-SLR, 2003 U.S. Dist. LEXIS 17904, at *9-*12 (D. Del. Oct. 6, 2003) (holding that predominance is "readily met" in securities fraud cases and rejecting defendants' arguments that lead plaintiffs are not entitled to the fraud-on-the-market presumption of reliance and that individual issues of reliance will predominate); *Bovee v. Coopers & Lybrand*, 216 F.R.D. 596, 607 (S.D. Ohio 2003) (holding that "[w]hen the fraud on the

market theory is invoked, courts agree that the legal and factual issues common to all members of the class will predominate over individual issues" and that plaintiffs are entitled to fraud-on-the-market theory's reliance presumption based on the allegations of the complaint, as the court conducts only a "preliminary investigation" into whether that theory is available on class certification); *In re Applied Micro Circuits Sec. Litig.*, No. 01CV0649 K (AJB), 2003 U.S. Dist. LEXIS 14492, at *10 (S.D. Cal. July 10, 2003) (when fraud-on-the-market theory reliance presumption alleged, no individual reliance issues will preclude class certification).

Finally, defendants cite to *Richland v. Cheatham*, 272 F. Supp. 148 (S.D.N.Y. 1967), which denied class certification, stating that "[f]or the same reasons [in that case], there is no predominant question of law or fact that extends throughout the entire class period in this case." Certain Defendants' Opp. at 8. However, *Richland* did not consider the fraud-on-the-market theory or its reliance presumption and it is factually so different from this case – particularly because it explicitly did not involve allegations of a common scheme to defraud over the entire class period – that it should be disregarded. In *Richland*, the plaintiffs – all of whom only purchased fractional shares arising from stock dividends in "infinitesimal" amounts – ***conceded*** that they had not alleged a "'common course of conduct [or scheme] over the entire period,'" and the fact that they did not do so was key to the court's finding that no predominate question of law or fact existed that covered the entire class period. 272 F. Supp. at 152-54. That is not the case here, nor was it the case seven years later in that same district court, in *Aboudi v. Daroff*, 65 F.R.D. 388, 390-91 (S.D.N.Y. 1974).

In *Aboudi*, the court disregarded the same arguments that the defendants make here when it held that because the plaintiffs allege a common scheme to defraud, there are no individual reliance issues that defeat class certification, even when there are numerous misstatements and events that are alleged as part of that scheme:

> Defendants' primary argument is that because of the number of different documents and events plaintiff has relied on to establish the alleged misconduct,

there are not questions of law or fact common to all members of the class. However, the fact that plaintiff has not chosen to rely on a single misrepresentation or on a single document containing several misrepresentations cannot serve to defeat his class action claim.... Where, as here, it is alleged that a series of reports and statements containing interrelated and cumulative misleading data were issued to the investing public, a course of conduct is present which raises questions common to all those who purchased during the period when the data was being disseminated.

Id. at 390-91. The *Aboudi* court also rejected the defendants' argument that *Richland* should apply, holding that *Richland* was distinguishable, because the plaintiffs there had not alleged one scheme to defraud that covered the entire class period. *Id.* at 391-92; *see also Kane Assocs. v. Clifford*, 80 F.R.D. 402, 407 (E.D.N.Y. 1978) (rejecting defendants' reliance on *Richland* when plaintiffs allege a fraudulent scheme that covers the entire class period).

In short, none of the cases cited by Certain Defendants support their proposition that material variations in statements or degrees of reliance preclude class certification here.

B. Supposed Individual Issues Do Not Plague the Class

1. Individual Issues of Damages Do Not Preclude Class Certification

Certain Defendants claim "certification of the class proposed by Plaintiffs is inappropriate because of the individualized nature of the damages calculations." Certain Defendants' Opp. at 9. Courts, however, have consistently rejected the argument that individual damages questions prevent class certification. It is well settled that "differences in individual questions of reliance and amount of damages are not grounds for refusing to permit an action to proceed as a class action."[20] 7 *Newberg on Class Actions* §22:64. ***"[I]t uniformly has been held that differences among the members [of a class] as to the amount of damages incurred does not mean that a class action would be inappropriate."*** 7B Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal*

---

[20] Individual Defendants raise similar arguments regarding damages under §20A. Those arguments are more fully addressed *infra* §IX.B.3.

Practice and Procedure: *Civil 2d* §1781, at 8 (2d ed. 1986); *First RepublicBank*, 1989 U.S. Dist. LEXIS 11139, at *24 n.14 ("Differences among class members' damages is inherent in securities litigation, but do not render individual questions predominate nor defeat class action treatment."); *Gold Strike Stamp Co. v. Christensen*, 436 F.2d 791, 798 (10th Cir. 1970) ("The fact that there may have to be individual examinations on the issue of damages has never been held ... a bar to class actions."); *Blackie*, 524 F.2d at 905 ("The amount of damages is invariably an individual question and does not defeat class action treatment."); *Koenig v. Smith*, 88 F.R.D. 604, 609 (E.D.N.Y. 1980); *Lewis*, 78 F.R.D. at 306-07.[21]

Defendants cite *Bell Atl. Corp. v. AT&T Corp*, 339 F.3d 294, 307 (5th Cir. 2003), but the court in *Bell Atlantic* stated the law correctly, finding "[w]e realize that relatively few motions to certify a class fail because of disparities in the damages suffered by the class members. Even wide disparity among class members as to the amount of damages suffered does not necessarily mean that class certification is inappropriate ... and courts, therefore, have certified classes even in light of the need for individualized calculations of damages." *Id.* at 306.

The claim in *Bell Atlantic*, an antitrust case, arose from AT&T's refusal to permit the passage of caller identification data across its long-distance telephone network. Plaintiffs were allegedly injured by an increased cost of labor and by the amount of time class members would have saved per call had caller identification been available. *Id.* at 304. The court held because of the type of harm alleged, individual issues concerning damages predominated over questions common to the proposed classes. *Id.* at 306.

---

[21] Furthermore, defendants' arguments if taken seriously would prove far too much. Every securities class action requires a determination of damages of the type decried by defendants in this case. In particular, plaintiffs' damage showing typically consists of expert testimony of the "inflation" in the stock price that existed during the class period, a jury determination of these aggregate damages and an administrative claims process where individual claims are determined.

Here, unlike *Bell Atlantic*, an inquiry into individual class members' damages at trial is unnecessary. *In re Texas Int'l Sec. Litig.*, 114 F.R.D. 33, 43 (W.D. Okla. 1987) ("[p]roof of damages can be demonstrated on a classwide basis by the use of a generalized or formulary approach .... Once the jury determines the formula or daily amount of per share damages, the determination of damages sustained by individual class members usually involves only the mechanical task of applying a formula to the date and amount of each individual's purchase."); *Queen Uno Ltd. P'ship v. Coeur D'Alene Mines Corp.*, 183 F.R.D. 687, 693 (D. Colo. 1998) ("[I]n a Rule 10b-5 action, damages are determined by the out of pocket rule. The out of pocket rule dictates that damages are determined between the stock purchase price and the true value of the stock at the date of purchase."). Class members in the present action need only prove that defendants artificially inflated the price they paid for Enron securities through their scheme to defraud. Moreover, a number of movants ***concede*** damages, at least as to §11, are "formulaic." *See* The Outside Directors' Amended Memorandum Concerning Certification of Class Claims Under Section 11 ("Outside Directors' Mem.") at 17.

As a subspecies of their argument regarding damages, Certain Defendants argue two proposed class representatives should not be included in the class. Certain Defendants' Opp. at 9-10. Defendants are wrong. Both Hawaii Laborers' Pension Fund and Teamsters 175 & 505 lost money on Enron bonds and have brought claims under §11. Any gains on stock simply have no bearing on whether these plaintiffs belong in the class. Both Hawaii Laborers' Pension Fund and Teamsters 175 & 505 were damaged by defendants' fraud. No more is required.

2. Defendants' Arguments Regarding Timing of Purchases Are Misplaced

Various defendants claim certification is improper if certain class members bought after the truth was partially revealed. Defendants are incorrect. Just as here, defendants in *In re U.S. Healthcare, Inc. Sec. Litig.*, No. 88-0559, 1988 U.S. Dist. LEXIS 11106, at *6 (E.D. Pa. Sept. 29,

1988), argued "[a]ssuming plaintiffs [sic] allegations to be true, plaintiffs who purchased during the early class period likely relied – directly or indirectly – on factors quite different form those who purchased late." The court disagreed, holding that because plaintiffs' complaint alleged "'a common and consistent course of conduct, which artificially inflated the market for [the company's] securities during the Class Period,'" certification of a class including late purchasers was proper. *Id.* at *7. The same reasoning is applicable here. Common questions of law and fact clearly predominate in this action over any possible individual issues of reliance. "Plaintiffs allege a web of illegal conduct. Defendant ..., however, focuses on the peculiarities of only one strand of that web. I find that common questions predominate." *Id.* at *8.

Defendants cite no case law to support their argument that late purchasers should not be included in the class. There is, however, plenty of case law repeatedly certifying securities class actions which do include class members who purchased after disclosures were made. *See Kalodner*, 172 F.R.D. at 208 (certifying the class and holding, "[t]he hypothetical conflict between early and late purchasers does not destroy typicality"); *In re Miller Indus. Sec. Litig.*, 186 F.R.D. 680, 687 (N.D. Ga. 1999); *In re Sumitomo Copper Litig.*, 182 F.R.D. 85, 92 (S.D.N.Y. 1998); *Bovee*, 216 F.R.D. at 610-11. Just as in these cases, the inclusion of late purchasers as class members should not be a bar to certification.

Similarly, defendants contend plaintiffs' claims cannot be typical of the claims of class members who purchased at different times in reliance on different information. Financial Institutions' Opp. at 16-17; Certain Defendants' Opp. at 7-8. "It is now settled, however, that the claims of such a plaintiff are typical of the claims of the class if all the documents relied upon are part of a common course of conduct or common scheme to defraud." 7 *Newberg on Class Actions* §22:26 (observing that "[d]efendants in securities class actions have often argued that a plaintiff's claim cannot be typical of the claims of class members who purchased at different times in reliance

on different documents"); *see also* 4 Herbert B. Newberg, *Newberg on Class Actions* §22.13 at 34 (2d ed. 1985) (same). Indeed, "[m]any courts have observed that differences in the timing of stock purchases by class representatives do not make their claims atypical, if plaintiffs allege a common scheme of misrepresentation." *Bovee*, 216 F.R.D. at 610; *In re Intelcom Group Sec. Litig.*, 169 F.R.D. 142, 148 (D. Colo. 1996) ("Although the plaintiffs may have purchased their stock at different times, and relied upon different sources of public information in making their investment decisions, those variations are insufficient to defeat the class on typicality grounds.").[22]

3. Current and Former Enron Employees Should Be Included in the Class

Without citing any authority, Certain Defendants claim that the former and current Enron employees should not be included within the proposed class. Certain Defendants' Opp. at 11. Defendants base this claim on the fact that in the consolidated *Tittle* actions present and former Enron employees filed claims in which they alleged misrepresentations that were made to them as employees of Enron. According to defendants, these claims prevent present and former employees of Enron from being members of this class because they relied on non-public information in deciding to purchase Enron securities.

---

[22] *See also Fox v. Equimark Corp.*, [1994-1995 Transfer Binder], Fed. Sec. L. Rep. (CCH) ¶98,384, at 90,628 (W.D. Pa. 1994) (individual differences regarding the purchasing and selling of stock during the class period do not destroy the typicality requirement; "[a]ll purchasers of stock during a class period share a common interest in showing that the stock was unlawfully inflated"); *Kerns v. Spectralink Corp.*, No. 02-D-263, 2003 U.S. Dist. LEXIS 11711, at *17 n.2 (D. Colo. July 2, 2003) (same); *In re Atl. Fin. Sec. Litig.*, No. 89-645, 1992 U.S. Dist. LEXIS 2706, at *13 (E.D. Pa. Feb. 28, 1992) (defendants' argument "would foreclose class treatment of actions alleging securities fraud, a result contrary to the general rule that class actions are a desirable means to resolve claims based on securities law"); *Weiss v. Drew Nat'l Corp.*, 71 F.R.D. 429, 430 (S.D.N.Y. 1976) (in a 10(b) action, the court held that plaintiff who purchased her stock in April 1972 could represent a class of all purchasers over a four-year period from 1971 to 1974 because the complaint alleged a common scheme to defraud).

Defendants' argument is meritless. In *Tittle*, the court specifically stated former and current Enron employees could join the *Newby* action. "If those *Tittle* Plaintiffs with claims that are cognizable under the federal securities laws were to replead to assert securities violations or to join the class in *Newby*, or to bring suit in state court alleging the same facts under state law, the common law claims of conspiracy and negligent misrepresentation would also be preempted by SLUSA." *Enron*, 2003 U.S. Dist. LEXIS 17492, at *326. There is no reason why former and present employees should be prevented from joining the *Newby* class. Those named as defendants, however, will be excluded.

Again without citing any authority, defendants argue there are "highly individualized questions regarding whether particular employees could possibly have been deceived by a particular purported misrepresentation based on the information to which they were exposed in the course of their duties at Enron." Certain Defendants' Opp. at 11. Once again, defendants are wrong. To say all present and former Enron employees should be excluded from the class because some ***might*** have known about the alleged fraud disadvantages thousands of potential class members who lost their life savings in Enron. Both current and former Enron employees, except for named defendants, should be included within the *Newby* class.

V. A CLASS ACTION IS THE SUPERIOR METHOD TO ADJUDICATE THE CLAIMS

A. The Class as Defined by Plaintiffs Is Manageable

In claiming this case poses insurmountable manageability problems, defendants make mountains out of molehills, rely on wholly inapposite authority and completely ignore the efficient and masterful job the Court has done thus far in managing this litigation.

No one claims the Enron litigation will be simple. But the Court should be reluctant to deny certification based on the fact that it might be difficult. *See, e.g., In re South Cent. States Bakery Prods. Antitrust Litig.*, 86 F.R.D. 407, 423 (M.D. La. 1980) ("Although this case, as a class action,

will involve management difficulties, proper judicial management is feasible and should result in corresponding efficiencies."). Moreover, the "Court cannot deny certification, however, merely because the number of plaintiffs make the proceeding complex or difficult." *In re Domestic Air Tran. Antitrust Litig.*, 137 F.R.D. 677, 693 (N.D. Ga. 1991) (granting certification over defendants' objection regarding manageability because the class would number in the millions and will "involve over 400 million transactions"). The court in *Domestic Air* acknowledged it was concerned about manageability but "'difficulties in management are of significance only if they make the class action a ***less*** "fair and efficient" method of adjudication than other available techniques.'" *Id.* As here, the court found a class action "the only fair method of adjudication for plaintiffs." *Id.*

Moreover, all of the factors specified in Rule 23(b)(3) tip heavily in favor of a finding of predominance and superiority. Those factors are: (1) the interests of class members in controlling their own litigation; (2) the nature and extent of any relevant, pending litigation brought by or against members of the class; (3) the desirability of concentrating the litigation in the particular forum; and (4) any management difficulties the class action is likely to present. *See* Fed. R. Civ. P. 23(b)(3).

First, plaintiffs in securities fraud actions, compared to plaintiffs in mass tort actions, are less likely to have an interest in controlling the litigation. For example, the personal nature of injuries suffered may result in a situation where "class members are likely to be emotionally involved in the litigation." 5 James W. Moore, *Moore's Federal Practice* §23.49(2)(a) (Matthew Bender 3d ed. 2002). In a securities suit, or other case where only money losses are at issue, such an interest is less likely to exist.

The second factor, the extent and nature of litigation already commenced, also tips in favor of certification. Because of the nature of securities litigation under the PSLRA, there is relatively little related litigation commenced by class members. Even though a number of private cases have been

filed, they represent only a small fraction of the class members. Related cases (for the most part) have been transferred to the Southern District of Texas for coordination with or consolidation into this case. Thus, while a number of Enron-related cases have been filed, it is still more efficient for the class case to address the vast number of class members' claims.

The third factor, the desirability of concentrating all claims in a single forum, is undoubtedly met here. The majority of witnesses and documents are located in the Southern District of Texas. This forum is clearly ideal.

The fourth factor, manageability, is also met here. Defendants' arguments to the contrary are nothing more than doom and gloom scenarios which utterly fail to appreciate the manner in which this case has been litigated for two years. From the beginning, the Court and the parties have worked together and have creatively crafted numerous solutions which ease the burden on all parties. It has been apparent to all involved from the inception of the Enron securities litigation that this case would generate millions and millions of documents. On February 27, 2002 the Court ordered the parties to agree to a plan for the management of those documents. It was not a simple task. The documents were in several different forms – hard copy, electronically stored within proprietary software, audio and video tapes of varying sizes and millions of emails. Early estimates of document production from Enron alone were nearly 20 million pages. Lead Counsel for the *Newby* plaintiffs, along with Lead Counsel for the *Tittle* plaintiffs, a representative for the bank counsel and a representative for counsel for the officers and directors of Enron worked together to establish a production protocol. The parties agreed to establish a document depository – one facility to house all of the production for Enron-related cases. After reviewing numerous bids, the parties agreed to hire an administrator for the depository. This arrangement has allowed all of the parties participating in the case to take advantage of volume pricing, providing the class, as well as the defendants, with

significant savings on discovery costs. To date, there have been approximately 30 million pages of documents processed and made available to the parties.

Finally, in an effort to facilitate communications between the parties, Lead Plaintiff established a website for the service of all documents filed with the Court in any Enron-related case at http://www.esl3624.com. When a new document is filed, an email notification is sent automatically to all who have registered for service. Then, using a password and user identification, each authorized party can go to the website and review, download or print the document free of charge. Since the website was activated in June 2002, more than 200,000 emails have been generated by the site, saving the parties the costs of copying and delivering duplicates of each filing to the more than 450 attorneys now involved.

With the Court's direction and guidance, the parties to the Enron securities litigation have demonstrated not only that this case is manageable, but that efficient management need not be complicated nor prohibitively expensive. Every step of the way, the Court has shown its ability to manage this large-scale case. Indeed, from the inception of this litigation, the Court has been active in devising practical methods of ensuring all litigants have equal access to the Court. Other solutions to management concerns will no doubt be devised by able counsel on both sides.

Defendants have strained mightily to break this case into a million little pieces – plaintiffs bought on different days, some relied on EBS news, there are multiple statements spanning a three-year period, but in the end, this case is really about defendants' false and misleading statements and devices and contrivances which falsified Enron's financials during the proposed class period. This does not mean the case is simple. But it surely does not mean class treatment is inappropriate.

Leaving aside massive antitrust and tort cases which have been certified and taken to trial, Lead Counsel has litigated on a class-wide basis cases larger than this. Indeed, *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 720 F. Supp. 1379 (D. Ariz. 1989), in a number of respects

dwarfs Enron – and it went to trial. The defendants in that case included: the Supply System; its directors; the nineteen public utilities and four cities that comprised the twenty-three members Supply System; the sixty-eight Project 4/5 Participants that were not members of the System; the individual and alternate members of the Participants Committee; Blyth Eastman Paine Webber, financial consultant to the System; R.W. Beck and Associates, consulting engineers to the System; United Engineers and Constructors, and Ebasco Services Incorporated, architect/ engineers for Projects 4/5; Wood Dawson Smith Hellman, bond counsel; Houghton Cluck Coughlin & Riley, special counsel to the System; Merrill Lynch, Pierce, Fenner & Smith Inc., Salomon Brothers Inc., Smith Barney Harris Upham & Co., Inc. and Prudential-Bache Securities Inc., bond underwriters; Moody's Investors Service and Standard & Poor's Corporation, securities rating agencies; and the Bonneville Power Administration ("BPA"). The Chemical Bank Complaint named the Supply System; its directors; the twenty-three member utilities; the eighty-eight 4/5 Participant utilities, some of which were also members of the Supply System; 4/5 Participants Committee members; and BPA. *Id.* at 1386.

ACC/Lincoln was also a mammoth case stemming from the collapse of Lincoln Savings & Loan in the late 1980s. That case, which also went to trial, shares numerous similarities with this case. The court certified a single class of investors who purchased five different securities of American Continental Corp. ("ACC") (stocks, bonds and debentures).[23] The court certified a class period of more than three years for an action that sought relief under §§10(b) and 18 of the 1934 Act, §§11 and 12 of the 1933 Act, RICO, common-law fraud, negligent misrepresentation, breach of

---

[23] The Financial Institutions weakly try to distance themselves from *ACC/Lincoln*, claiming the case has seven times as many defendants and eight times as many securities. Financial Institutions' Opp. at 19 n.12. Leaving aside defendants' questionable mathematics, it is plain the case is on point. It was a massive securities fraud, with numerous types of defendants and claims that were certified as a class action.

fiduciary duty and Cal. Corp. Code §§1507 and 2540, the last of which are similar to the Texas Securities Act. *ACC/Lincoln*, 794 F. Supp. at 1432, 1436. Defendants in *ACC/Lincoln* included Andersen and two other accounting firms, two law firms, the trustee of an employee stock-ownership plan, a bank, ACC and its former chairman, Charles H. Keating, Jr. *Id.* at 1432-33. Discovery in that case lasted two years and included more than 600 depositions. Jury trial began on March 13, 1992 and continued until July 10, 1992 with a verdict for plaintiffs. Various settlements were reached before and during trial. *ACC/Lincoln*, a case actually tried to verdict by Lead Counsel, demonstrates this case is manageable. Technological advances over the past decade, moreover, make trying such a case infinitely more manageable.

B. Defendants' Authority Regarding Manageability Is Inapposite

The Financial Institutions strain to find authority for their argument that this case is unmanageable. *See* Financial Institutions' Opp. at 14-18.[24] They come up empty, citing wholly inapposite cases dealing with mass tort and consumer fraud. Defendants fail to cite any cases (either in circuit or out) which deny class certification in a securities fraud case on manageability grounds. This is because class treatment for defrauded investors, each with a relatively small stake, is preferable to a series of individual trials. *See, e.g., Frietsch v. Refco, Inc.*, No. 92 C 6844, 1994 U.S. Dist. LEXIS 312, at *28 (N.D. Ill. Jan. 14, 1994) ("'[T]he potential manageability problems suggested by defendants could never create a situation that is less fair and efficient than having 2,000 plaintiffs attempting to prove up nearly identical claims against defendants.'"); *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985); *Gruber v. Price Waterhouse*, 117 F.R.D. 75, 78 (E.D. Pa. 1987) ("Securities actions are particularly suitable for class action treatment and any doubts should be

---

[24] The Certain Defendants rely on the same off-base cases. *See* Certain Defendants' Opp. at 3-4.

resolved in the favor of allowing a class action."). The cases cited by defendants are worlds away from securities fraud.

The Financial Institutions cite to *Castano*, in support of their argument that superiority is not established here. But, as noted, *Castano* has no application in this case. The proposed class was all nicotine dependant persons (living or dead) in the United States since 1943. Individual issues in that case were manifest. The court would have had to grapple with 50 state's laws on a variety of claims as well as wade into sticky issues of medical causation. *Castano*, 84 F.3d at 743. Defendants' talismanic recitation of *Castano*'s denial of class certification is unavailing.

And the Financial Institutions' other cases fare no better. In addition to *Castano*, the Financial Institutions rely on cases dealing with asbestos exposure, *Georgine v. Amchem Prods.*, 83 F.3d 610 (3d Cir. 1996), penile implants, *In re American Med. Sys.*, 75 F.3d 1069 (6th Cir. 1996), and racial discrimination, *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998). Each of these types of cases have however, often been found unwieldy as a class action precisely because, unlike a securities case, they are beset by individual issues.

The Financial Institutions present *Carpenter v. BMW of N. Am., Inc.*, No. 99-CV-214, 1999 U.S. Dist. LEXIS 9372 (E.D. Pa. June 21, 1999), as a case "far less complex" than *Enron* that denied class treatment because of manageability problems. *Carpenter*, however, is nothing like this case. In *Carpenter*, the court was presented with a consumer fraud case based on the laws of all 50 states. The court noted that numerous variations in state laws militated against a superiority finding. *Id.* at *8. The *Carpenter* court, in discussing the reliance element in state law fraud claims actually ***distinguished*** its case from federal securities fraud claims. *Id.* at *9 n.5. The *Carpenter* court also found numerosity lacking, clearly not an issue here. *See id.* at *22.

VI. THE CLASS PERIOD IS PROPER

A. The Class Period Should Not Be Shortened Because Substantial Questions of Fact Exist that Must Be Resolved in Favor of a Broader Class Period

On a motion for class certification, a court must "'not inquire into the merits of this case by determining which statements ... actually opened the door to litigation and which slammed the door shut.'" *In re Health Mgmt. Sec. Litig.*, 184 F.R.D. 40, 44 (E.D.N.Y. 1999); *see also First Republicbank*, 1989 U.S. Dist. LEXIS 11139, at *14 (finding that "to shorten the Class Period at this time would be an impermissible examination of the merits").

Thus, a court should not entertain attempts to shorten a class period on a motion for class certification because "arguments about the commencement and termination dates of a proposed class period raise questions of fact going to the merits, and are therefore not a proper subject for inquiry at the certification stage." *Weinberger v. Thornton*, 114 F.R.D. 599, 606 (S.D. Cal. 1986); *see also In re Gaming Lottery Sec. Litig.*, 58 F. Supp. 2d 62, 77 (S.D.N.Y. 1999) ("Whether claims falling outside some narrower time window within the class period are, in fact, groundless on the merits is a question of fact for the jury that should not be answered when the court decides whether to certify a class."); *Nathan Gordon Trust v. Northgate Exploration*, 148 F.R.D. 105, 108 (S.D.N.Y. 1993) ("The court declines to rule on the factual issue of whether there had been a proper curative disclosure ... [and] will certify the broader class period."); *In re Worlds of Wonder Sec. Litig.*, No. C 87 5491 SC, 1990 U.S. Dist. LEXIS 8511, at *28-*29 (N.D. Cal. Mar. 23, 1990) ("Because resolving this issue goes to the merits of Plaintiffs' action the court will not shorten the class period ... at this juncture.").

In this case, Lead Plaintiff seeks to certify a class period that begins on October 19, 1998 and ends on November 27, 2001. In opposition to the Lead Plaintiff's class certification motion, the Financial Institutions raise substantial questions of fact regarding when the class period should begin

and end, arguing that the class period should be shortened to April 8, 1999 through October 16, 2001. As discussed below, these questions of fact should not be determined at the certification stage, but instead must be resolved in favor of the broader class period proffered by Lead Plaintiff. *See WorldCom*, Order at 89-90.

B. The Proposed Class Period Properly Ends on November 27, 2001 as Alleged By Plaintiffs

The class period should end on November 27, 2001. As set forth more completely in Lead Plaintiff's motion for class certification and in the Amended Complaint, substantially more disclosures were made ***after*** October 16, 2001 through early November 2001 and up to November 28, 2001 about the complex fraudulent scheme perpetuated by defendants upon investors in Enron securities. These disclosures revealed compelling, additional facts about the true condition of Enron, but ***crucial information, including information regarding the relationship between Enron and the Financial Institutions remained undisclosed during this period***. The Financial Institutions argue, however, that the class period should be shortened to October 16, 2001, the date of the first announcement by Enron revealing the need to record a $1 billion charge-off. Alternatively, they argue that the class period should be shortened to November 8, 2001 because "[o]n that day, Enron publicly announced that it was restating its financial statements for 1997 through 2000 to eliminate approximately $600 million in profits and approximately $1.2 billion in shareholders' equity." *See* Financial Institutions' Opp. at 25. The Financial Institutions thus raise a substantial question of fact that must be resolved in favor of a broader class period at the class certification stage. *WorldCom*, Order at 90.

1. Substantial Questions of Fact Regarding the Scope of the Class Period Should Be Resolved in Favor of a Broader Class Period

In a very recent opinion rejecting defendants' opposition to class certification in the *WorldCom* case, Judge Cote stated significant or substantial questions of fact concerning whether

press releases are completely curative should be resolved in favor of the broader class period proposed by Lead Plaintiff:

> ***Here, significant questions of fact remain as to whether the disclosures to which the SSB Defendants point provided an effective cure.*** Although press coverage indicted the independence of telecommunications analysts generally, and even Grubman in particular, crucial information particular to the relationship between [WorldCom and the defendants] remained undisclosed during the Class Period....

Order at 90.

In support, Judge Cote also pointed out that the cases cited by the defendants were in accord:

> The two cases on which the defendants rely in fact held that ***class certification for the broader class was appropriate because questions of fact remained as to whether the purportedly curative press releases effected a complete cure of the market.*** *See Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 572 (2d. Cir. 1982); *Friedlander v. Barnes*, 104 F.R.D. 417, 421 (S.D.N.Y. 1984). As these cases indicate, ***a class period should not be cut off if questions of fact remain as to whether the disclosures completely cured the market.*** *See Sirota*, 673 F. 2d at 572.

Id. at 89.

As in the *WorldCom* case, here significant questions of fact exist as to whether Enron's announcement on October 16, 2001 or November 8, 2001 completely cured and corrected the prior false statements. Here, as in *WorldCom*, the October 16, 2001 and the November 8, 2001 press releases were not completely curative because they did not disclose crucial information about the intricate web of fraud that tied the Financial Institutions with Enron, the true nature of Enron's relationship with the Financial Institutions or the extent and complexity of Enron and the defendants' scheme to defraud. *See, e.g.*, ¶¶364-393.

The Financial Institutions also rely on cases that find that class certification for the broader class was appropriate because questions of fact remained as to whether the purportedly curative press release effected a complete cure of the market. *See, e.g., In re Ribozyme Pharms., Inc. Sec. Litig.*, 205 F.R.D. 572, 579 (D. Colo. 2001) (holding that the substantial question of fact regarding whether a press release was curative should be resolved in favor of certifying a broader class

period).[25] And, as set forth below, the other cases cited by the Financial Institutions in support of their request for a shortened class period are inapposite. Because questions of fact remain as to whether the October 16, 2001 or November 8, 2001 press release completely revealed Enron's and the defendants' complex scheme of financial shenanigans, or whether it completely – or even partially – cured the market, the class period should remain broad and should not be shortened. *See, e.g., Western Union*, 120 F.R.D. at 641 (whether "curative" information revealed entire fraud "is an issue that should be left to the trier of fact at trial"); *Anderson v. Bank of S., N.A.*, 118 F.R.D. 136, 147 (M.D. Fla. 1987) (negative information available in the market does not necessarily preclude claims – the effect of such disclosure is a question of fact to be determined at trial).

---

[25] The Financial Institutions also cite *LTV*, in support of their shortened class period request, but that case also held that "a sufficiently substantial question has been presented such that the class period must commence at the earlier time period proffered [by plaintiffs]." 88 F.R.D. at 147. Even the class period eventually certified in that case was over three years long. The court in *LTV* wrongly shortened the end of the class period to exclude purchases made after the purportedly curative disclosure and its decision on that point should be disregarded. Otherwise, the *LTV* case actually supports Lead Plaintiff's arguments regarding class certification and reliance. *Id.* at 138-45. There, as here, the securities claims alleged (under §10 of the 1934 Act and §§11 and 12 of the 1933 Act) involved numerous different types of publicly traded securities with a number of proposed class representatives who bought or sold any of the numerous different classes of securities over a three year period. *Id.* Although the claims were all different, the substantive allegations were commonly threaded together by an alleged scheme to defraud, just as in this case. There, as here, the purported class was numerous – at least 100,000 putative class members involving over 39,000 transactions of LTV common stock alone. ***The court in LTV certified this single class, and disregarded the same arguments made by defendants here,*** holding that: (1) plaintiffs are not required to show individual reliance, but can rely on the presumptions of reliance under the fraud-on-the-market theory, if reliance is required to be proven with respect to that particular plaintiff's claims; (2) ***notwithstanding the number of plaintiffs, the different types and classes of securities at issue, or the fact that §§10, 11 and 12 have different proof requirements, there is a predominance of common issues, given that the substantive allegations for all claims are commonly threaded by the allegations of a scheme to defraud***; and (3) having individual trials would be ridiculous, in light of all this, as "the specter of thousands of mini-trials of the reliance question and damage amounts would then not now seem sufficiently palpable to override the economies of a single trial." *Id.* at 142.

2. Defendants' Arguments in Support of Shortening the Class Period Are Without Merit

The Financial Institutions' arguments for shortening the class period to October 16, 2001, or alternatively to November 8, 2001, rely on inapposite authority, are inappropriate at class certification and, most importantly, ignore the fact that questions of fact regarding the size of the class period should be resolved in favor of a broader class period. *See WorldCom,* Order at 89-90.

The defendants cite *Provenz v. Miller*, 102 F.3d 1478, 1493 (9th Cir. 1996), in support of their position on the issue of the adequacy of the disclosure "'to effectively counterbalance' Enron's earlier financial reports," but they take and use this quote completely out of context. Financial Institutions' Opp. at 21. That quote was taken from an analysis on ***summary judgment*** of the truth-on-the-market doctrine, which is not at issue here or properly considered on a class certification motion.

Similarly, defendants cite no supportive authority for their position that their loss causation arguments are appropriate now. The Financial Institutions improperly rely upon the *Arrington* case for their proposition that, for §§11 and 12(a)(2) claims on securities acquired after October 16, 2001, class members are subject to an absolute loss causation defense. *Arrington v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 651 F.2d 615, 620 (9th Cir. 1981). That case does not support their proposition. In *Arrington*, the Ninth Circuit did not consider an appeal from a class certification decision, nor did it consider loss causation defense issues for claims brought under §§11 and 12 of the 1933 Act, or even whether such a defense can properly be determined at the class certification stage. Instead, the *Arrington* court considered the appeal of a lower court decision that a stockbroker was liable under §10(b) and Rule 10b-5 for inducing stockholders to convert their cash accounts to margin accounts and to invest without being told of the risk of speculative investments. *Id.* Moreover, Financial Institutions again use a quote that is taken out of context when they cite *Arrington* for their statement that "plaintiffs 'cannot recover that part of their loss caused by their

own failure, once they had reason to know of the wrongdoing, to take reasonable steps to avoid further harm.'" Financial Institutions' Opp. at 23-24. That quote was taken from the analysis of the time frame for damages awarded in *Arrington*, not from any consideration of a loss causation defense at the class certification stage.

And the defendants ignore the crucial fact that the court in *Goldkrantz v. Griffin*, No. 97 Civ. 9075 (DLC), 1999 U.S. Dist. LEXIS 4445, at *7-*20 (S.D.N.Y. Apr. 5, 1999), determined the loss causation defense at summary judgment, ***not at the class certification stage***. This supports Lead Plaintiff's position that the Financial Institutions' loss causation defense is inappropriately considered at class certification.[26]

Nor is there any merit to defendant's argument that purchasers after October 16, 2001 are precluded as a matter of law from the benefit of the fraud-on-the-market presumption.[27] As set forth in §IV.A., such a proposition is directly contrary to the holdings on the presumption of reliance in the *WorldCom* case. And the cases cited by the Financial Institutions do not support their argument.

---

[26] Moreover, when it comes to loss causation, defendants have argued in the past that their fraud was not revealed until after the class period ended. For example, at page 21 in the Memorandum of Law of Merrill Lynch & Co., Inc. and Merrill Lynch, Pierce, Fenner & Smith, Inc. in Support of Their Motion to Dismiss Amended Complaint, filed on June 18, 2003, Merrill argued:

> In addition to failing to allege a primary violation of the securities laws by Merrill Lynch, plaintiffs' claim against Merrill Lynch must also be dismissed for failure to plead that any losses they have suffered were caused by Merrill Lynch's alleged conduct. The Nigerian Barge Transaction and the Power Swaps did not become publicly known until, respectively, April and August of 2002, nearly five months and nine months after the class period ended and long after the price of Enron securities had collapsed due to the revelation of other matters. Plaintiffs never plead – and, under these circumstances, they could never prove – that their financial losses were caused by the two alleged transaction [sic] engaged in by Merrill Lynch.

[27] Contrary to the Financial Institutions' suggestion, plaintiffs meant to imply nothing when they ***inadvertently*** omitted purchases made by Amalgamated Bank and San Francisco after October 16, 2001 in the motion to certify the class.

The Financial Institutions' reliance on the *Semerenko* case for their position that "Lead Plaintiff cannot save these claims [filed after October 16, 2001] by certifying them together with purchases made before October 16" is misplaced because that case is distinguishable. Financial Institutions' Opp. at 22; *Semerenko v. Cendant Corp.*, 223 F.3d 165, 181 (3d Cir. 2000). The Third Circuit in *Semerenko* did not consider class certification but instead reversed the lower court's order granting the defendants' motion to dismiss and remanded back to the district court. 223 F.3d at 169. The Third Circuit held plaintiffs, who alleged a class period of January 27, 1998 to October 13, 1998, sufficiently alleged the elements of reliance and loss causation in their complaint for violations of §10 and Rule 10b-5, and that the lower court wrongly analyzed the "in connection with" element. While the Third Circuit in *Semerenko* did find that "the Class has failed to demonstrate that it was reasonable for its members to rely on the defendants' prior financial statement and auditors' reports following the April 15, 1998 disclosure of the accounting irregularities," *id.* at 181, that finding was not made on an examination of the scope of the certified class, nor did the plaintiffs in that case appear to dispute that the April 15, 1998 disclosure was completely curative. That is not the case here.[28]

---

[28] Similarly, defendants' reliance on *In re Safeguard Scientifics*, 216 F.R.D. 577, 582 (E.D. Pa. 2003), is misplaced. Defendants cite *Safeguard*, stating that the court in that case observed "that a plaintiff's security purchases after the disclosure of the alleged fraud are a 'compelling reason to rebut the reliance presumption.'" *See* Financial Institutions' Opp. at 22. But that case is distinguishable. Although the court in *Safeguard* considered and denied plaintiff's class certification motion, the court there found that the typicality and adequacy requirements were not met for reasons that do not exist in the instant case: (1) the lead plaintiff was a day trader who increased his holdings in the corporation at issue even after the alleged fraud was publicly disclosed, and as a result, was potentially subject to unique defenses as to reliance and credibility; (2) another named plaintiff had brought arbitration proceedings and therefore could have been subject to defenses regarding those proceedings; and (3) the third named plaintiff said in his deposition that he was not concerned at all about the CEO's activity. *Safeguard*, 216 F.R.D. at 581-83.

Here, the plaintiffs hotly contest the curative effect of the October 16, 2001 press release and argue that the class period should end on November 27, 2001, shortly before Enron filed for bankruptcy. Because substantial questions of fact exist regarding the size of the class period, it is inappropriate for the Court to shorten the class period.

C. The Proposed Class Period Properly Begins on October 19, 1998

The Financial Institutions' sole argument against the class period beginning on October 19, 1998 is that claims for purchases made before April 8, 1999 are barred by the statute of limitations. The statute of limitations debate raises a substantial question of fact which is improper on class certification, and in any event, should be resolved in favor of plaintiffs, as well-settled authority and the *LTV* case cited by defendants holds. *LTV*, 88 F.R.D. at 147 (holding that because "a sufficiently substantial question has been presented such that the class period must commence at the earlier time period proffered [by plaintiffs]").

The statute of limitations is a factual issue and should therefore not be determined until after a factual investigation has been completed. *See Lamkin v. UBS Painewebber, Inc.* (*In re Enron Corp. Sec. Litig.*), MDL 1446, Order at 45-46 (S.D. Tex. Nov. 13, 2003) (Harmon J.) (declining to resolve statute of limitations defense on motion to dismiss "[b]ecause it is clear that Plaintiffs' claims based on seven of the registration statements are timely, and because discovery will determine whether those relating to the other three are, the court will not dismiss the latter claims now on limitations grounds"); *WorldCom*, Order at 80 ("The existence of this [statute of limitations] affirmative defense does not suggest that a class should not be certified in this case. Although affirmative defenses such as the statute of limitations defense may be considered as one factor in the class certification calculus, the existence of even a meritorious statute of limitations defense does not necessarily defeat certification."). As the court stated in *WorldCom*, "despite the possible presence of statute of limitations defenses, class members in the *Securities Litigation* are bound by a

'constellation of common issues' that predominate over any individual questions." *See id.* at 80-81 (citing *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000) (affirming class certification despite the possibility of statute of limitations defenses)).

Moreover, as Lead Plaintiff has previously argued in opposition to the Financial Institutions' motion to dismiss, the Sarbanes-Oxley statute of limitations extensions may apply to part or all of this case, including the subsidiaries named in the Amended Complaint filed after July 30, 2002, the effective date of Sarbanes-Oxley. *See* 107 P.L. 204, §804; 28 U.S.C. §1658. The bank subsidiaries added as defendants in the Amended Complaint filed on May 14, 2003 were used by their respective parents to perpetuate the alleged scheme to defraud. Since the Sarbanes-Oxley statute of limitations would apply to a case filed now against the financial institutions, it makes little sense to deny the plaintiffs the opportunity to pursue claims for the period October 19, 1998 to April 9, 1999 against the financial institutions.

VII. STANDING CONCERNS ARE A RED HERRING

A. Plaintiffs Have Standing to Bring §12(a)(2) Claims

The Financial Institutions again raise issues relating to standing under §12(a)(2).[29] They claim none of the proposed class representatives purchased in any of the foreign debt offerings and that intervention by ICERS cannot cure "standing defects." The Financial Institutions further claim ICERS has not established it can satisfy Rule 23(a)'s typicality and adequacy requirements. None of these arguments hold water.[30]

---

[29] *See* B of A Opp. at 5-6, 8. Standing issues form the crux of BAC's and BAS's separate opposition. For the same reasons the Financial Institutions' arguments fail, so too do BAC's and BAS's.

[30] In a footnote, the banks contend there is "no proposed class representative with standing to bring a Section 10(b) claim" "based on the Enron-related securities that are the subject of its Section 12(a)(2) claims." Financial Institutions' Opp. at 26 n.21. For the reasons detailed below, defendants are wrong.

Defendants offer only a cramped reading of the law, ignoring the facts of this case and policy considerations underlying Rule 23. Where, as here, the Lead Plaintiff's claims are based (in part) on misrepresentations "in the Registration Statements and on the same core course of conduct at issue in the Sections 11 and 12 claims," even those who did not purchase the exact security at issue can properly represent a class. *See WorldCom*, Order at 21. In *WorldCom*, defendants argued two named plaintiffs, Fresno and FCERA, were not adequate class representatives, because, defendants argued, they lacked standing under §12(a)(2). FCERA purchased bonds in one offering and Fresno purchased in the aftermarket. The court disagreed, holding that "[n]onetheless, both Fresno and FCERA are adequate class representatives, including for those members of the Class who purchased in either the 2000 or 2001 offerings." *Id.* at 27. This was because "the §12(a)(2) claim arises from the same course of conduct and the same Offerings, and involves the same defendants, legal theories and factual allegations that give rise to and inform the Section 11 claims.... Even [lead plaintiff] – although it did not purchase in either Offering – has claims based on the same Registration Statements and will have an incentive to pursue and prove many of the facts that underlie the Sections 11 and 12(a)(2) claims." *Id.* at 27-28.

Moreover, numerous courts have held named plaintiffs need not have purchased the precise security at issue. *See Endo v. Albertine*, 147 F.R.D. 164, 167-68 (N.D. Ill. 1993) (where a purchaser of common stock sought to represent a class of purchasers of debentures and notes as well as common stocks, the court found the purchasers' claims were typical, regardless of the type of securities purchased, because all of the claims arose out of the same allegations and omissions); *Epstein v. Moore*, No. 87-2984 (AET), 1988 U.S. Dist. LEXIS 5450, at *8-*9 (D.N.J. June 3, 1988) (typicality found to exist when a debenture purchaser sought to represent purchasers of common stock, debentures, and stock warrants); *In re Saxon Sec. Litig.*, No. 82 Civ. 3103, 1984 U.S. Dist. LEXIS 19223, at *18-*19 (S.D.N.Y. Feb. 23, 1984) (class consisting of both debenture and common

stock purchasers was certified because the two groups shared an overriding common interest in establishing defendants' liability); *Sanders v. Robinson Humphrey/Am. Express*, 634 F. Supp. 1048, 1057 (N.D. Ga. 1986) ("When plaintiffs have alleged such a common course of conduct, courts consistently have found no bar to class certification even though members of a class may have purchased different types of securities or interests, or purchased similar securities at different times."); *Teichler*, 1988 U.S. Dist. LEXIS 16448, at *10 (a class of debenture holders and stockholders was certified, even though no class representatives were debenture holders, because no actual conflict existed between debenture holders and stockholders); *Green v. Wolf Corp.*, 406 F.2d 291, 295, 301 (2d Cir. 1968) (court permitted shareholders to represent both shareholders and holders of debentures).

Defendants make much of the fact that plaintiffs' §12(a)(2) claims are based on nine different offerings. But without question, the offerings share important and common facts such as the financial statements incorporated into the various offering memoranda and the structure of the credit linked notes. Moreover, the offering memoranda for all the foreign debt securities incorporate or include financial statements alleged to be false or misleading. *See* ¶¶641.9, 641.14, 641.16, 641.19-.20, 641.23-.24, 641.27-.28, 641.31, 641.39-.40. For example, the Marlin Water Trust offering memorandum incorporates Enron's 2000 10-K, Form 10-Q for the quarter ending March 31, 2000, Form 8-Ks filed January 31 and February 28, 2001 and includes Enron's consolidated financial information for years ended 1998-2000. ¶¶641.37-641.40.[31]

---

[31] In addition, the banks contend "[n]ot one of the proposed class representatives" has satisfied the "threshold standing requirement" of purchasing "the securities issued and sold pursuant to the challenged communication." Financial Institutions' Opp. at 26-27 (stating §12(a)(2) requires that "the defendant either transferred title to the securities to the plaintiff or successfully solicited the plaintiff's purchase"). In the Amended Complaint, plaintiffs allege they or class members "***purchased***" foreign debt securities "***from***" the Financial Institutions, and the Financial Institutions "***sold***" foreign debt securities "***to*** plaintiffs and/or class members." ¶¶1016.4-5. These allegations

Indeed, these similarities make clear why ICERS can properly represent purchasers of all nine foreign debt offerings. ICERS will have an incentive to prove not just that facts related to Marlin Trust, but all nine offerings. *See, e.g.*, *Longden*, 123 F.R.D. at 556-57. Defendants' attempt to carve up the case into little pieces is simply unwarranted. ICERS seeks to represent all those similarly situated to it – there is no requirement that in order to be similarly situated the plaintiff must be in the ***exact*** same position as those who he or she seeks to represent. Rather, there must be sufficient similarities "to satisfy the Rule 23(a) requirements, whether characterized as concerns about the adequacy of representation or the typicality of the claims." *WorldCom*, Order at 27.[32]

Defendants concede ICERS has satisfied "the threshold requirement of a purchase," but claim ICERS has not demonstrated that it bought Marlin notes from any of the Financial Institutions.

---

make clear the Financial Institutions are charged with "actually pass[ing] title" to the foreign debt securities to plaintiffs or class members, which under the Fifth Circuit's decision in *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 871 (5th Cir. 2003), satisfies the statutory seller requirement.

[32] BAC's and BAS's cases do not support their §12(a)(2) standing argument. In *Ratner v. Sioux Natural Gas Corp.*, 770 F.2d 512 (5th Cir. 1985), the court reversed judgment after trial on a §12(a)(2) claim after finding plaintiffs had not purchased any securities because they already owned the leaseholds at issue. Here, by contrast, ICERS undoubtedly bought Marlin Water. Moreover, unlike the instant case, no common course of conduct affecting all securities purchasers existed in *Ratner*. In *In re Taxable Mun. Bond Sec. Litig.*, 51 F.3d 518 (5th Cir. 1995), the court held, in a RICO action, that plaintiff lacked standing because he did not share "the same interests and has not suffered the same harms" as the class members the plaintiff had claimed was injured. *Id.* at 522. In contrast, ICERS, indeed all proposed class representatives, share the same interests and suffered the same harms based in large part on the false financial statements incorporated by reference into the offering documents of all the foreign debt securities and, unsurprisingly, form the crux of plaintiffs' claims under §§10(b) and 11. In *In re Azurix Corp. Sec. Litig.*, 198 F. Supp. 2d 862 (S.D. Tex. 2002), *aff'd*, 332 F.3d 854 (5th Cir. 2003), the court granted defendants' motion to dismiss because the court found the plaintiff failed to purchase stock in the IPO. Similarly, in *In re Paracesus Corp.*, 6 F. Supp. 2d 626 (S.D. Tex. 1998), the plaintiffs did not allege that they purchased the security at issue. *Id.* at 631. And *James v. City of Dallas*, 254 F.3d 551 (5th Cir. 2001), is also unavailing. In that race discrimination case seeking an injunction, the court, finding plaintiffs did have standing to bring certain claims, made the unremarkable observation that "'[a] litigant must be a member of the class which he or she seeks to represent at the time the class action is certified by the district court.'" *Id.* at 562. Plaintiffs do not argue to the contrary.

Here, as ICERS' trade confirmation makes clear, ICERS purchased from defendant Deutsche Bank. *See* Ex. 33. ICERS has standing. Defendants' cases do not help them where, like here, plaintiff has proven she purchased from a defendant. *See* Financial Institutions' Opp. at 27 (citing *Pinter v. Dahl*, 486 U.S. 622, 642-47 (1988); *Cyrak v. Lemon*, 919 F.2d 320, 324-25 (5th Cir. 1990)).

Even if the Court denies ICERS' pending intervention motion and determines other proposed representatives cannot properly represent §12(a)(2) claims, this is no basis to deny certification. This was the situation in *Schwartz v. Celestial Seasonings,* 178 F.R.D. 545, 554 n.4 (D. Colo. 1998). The court granted certification and noted defendants' standing arguments were not dispositive. "Even if I were to conclude that one or more of the named Plaintiffs does not have §11 standing, this would not render the plaintiff atypical. The common question of whether the Registration Statement was materially misleading predominates over any secondary tracing issues that might be encountered. Moreover, if I were to determine that only certain members of the class have standing ... this is not a basis to deny certification ...." *Id.* at 554 n.4.

Thus, in the unlikely event ICERS is not allowed to intervene and the Court finds no other representatives can speak for foreign debt purchasers, certification would still be proper. Additionally, as part of its broad authority under Fed. R. Civ. P. 23, the Court could later allow intervention of a plaintiff with standing. *See* Fed. R. Civ. P. 23(d).

B. Arguments Regarding the Statute of Limitations Are Already Pending Before the Court

BAC and BAS again argue claims against them under §12(a)(2) are time-barred. B of A Opp. at 6-8. Issues relating to the statute of limitations and its applicability to certain claims raised in the Amended Complaint were the primary focus of BAC's and BAS's motion to dismiss and reply memorandum in support of their motion. Lead Plaintiff fully briefed the issue in its opposition to the Financial Institutions' motions to dismiss. There is simply no need to rehash these arguments at class certification. Certainly, a statute of limitations defense, even a meritorious one, in no way

affects the propriety of class certification. *See WorldCom,* Order at 80 ("The existence of this [statute of limitations] affirmative defense does not suggest that a class should not be certified in this case. Although affirmative defenses such as the statute of limitations defense may be considered as one factor in the class certification calculus, the existence of even a meritorious statute of limitations defense does not necessarily defeat certification."). Rather:

> It is further settled that in securities class actions possible differences in the application of the statute of limitations to class members, including the named plaintiff, will not preclude a finding of predominance of common issues. If individual class members are later barred from recovery by the statute of limitations, their claims are subject to dismissal.

7 *Newberg on Class Actions* §22:66 at 304-05. *See also Ramsey v. Arata*, 406 F. Supp. 435, 441 (N.D. Tex. 1975) ("To hold that the individual issues [including application of the statute of limitations] just discussed necessarily prohibit class treatment in a securities case would do violence to the remedial nature of the securities acts.").

When the court rules on the timeliness of Lead Plaintiff's claims in the Amended Complaint, the issue will be settled. But class certification of the proposed class is, and will still be, appropriate. Lead Plaintiff will not rehash here the arguments regarding the timeliness of its §12(a)(2) (and other) claims. *See* Lead Plaintiff's Opposition to the Financial Institutions' Motions to Dismiss at 4-38 (filed July 17, 2003).

BAC's and BAS's corollary to their argument that ICERS' claim is barred by the statute of limitations is that no person could at this time assert a §12 claim against them. B of A Opp. at 8-9. This argument is simply a rephrasing of their statute of limitations argument. If plaintiffs' §12 claims are dismissed, then clearly those claims will not be part of any certified class action in *Newby*.

C. ICERS Satisfies Rule 23(a)'s Typicality and Adequacy Requirements

The Financial Institutions claim ICERS is not typical because it relies on an investment advisor. Financial Institutions' Opp. at 29. This precise argument was soundly rejected by Judge

Cote in *WorldCom*. There, certain defendants argued "one or more of the named plaintiffs relied on the advice of highly sophisticated investment managers." *WorldCom,* Order at 22. Defendants argued this made them "atypical and subject to unique defenses." *Id.* This argument "can be swiftly rejected," the court held. *Id.* at 23. Methods such as computer models and reliance on investment advisors "is representative of methods used by many other investors." *Id.* Moreover, the PSLRA's purpose is bringing more institutional investors, and thus highly sophisticated investors into securities litigation, could be thwarted should reliance on advisors be disqualifying. "Such investors are likely to use advisors .... Making careful investment decisions does not disqualify an investor from representing a class of defrauded investors from relying on the presumption of reliance that is ordinarily available ...." *Id.* at 23-24. The Financial Institutions' authority is completely off base. In *In re Caremark Int'l Sec. Litig.*, No. 94 C 4751, 1996 U.S. Dist. LEXIS 8751 (N.D. Ill. June 21, 1996), the court granted certification but declined to certify one of four proposed representatives who purchased his shares through an investment pool. *Id.* at *19-*20. This was no sophisticated institutional investor charged with prudently managing thousands of retirees' pensions. Under defendants' rubric, it would be the rare pension fund or institutional investor that could serve as a class representative.

The Financial Institutions also attempt – albeit weakly – to question the adequacy of ICERS and its representative Barbara McFetridge. Financial Institutions' Opp. at 29-30. Defendants' only contention is ICERS is inadequate because it has not usurped Lead Plaintiff's position. Defendants fault ICERS for testifying that Lead Plaintiff should play a dominant role in the litigation. *Id.* First, ICERS' response was ***entirely*** appropriate. "While the defendants fault these named plaintiffs for deferring to lead plaintiff and for relying on their own counsel to interact with [lead plaintiff's] counsel, these named plaintiffs are in fact cooperating in the efficient management of the litigation."

WorldCom, Order at 37. "[T]here is no need for the additional named class representatives to duplicate the work of lead plaintiff." *Id.* at 37-38.

Second, ICERS' representative Ms. McFetridge clearly testified that ICERS "need[s] to ***stay informed and provide whatever needs to be done***." Ex. 32 at 183. As demonstrated in *supra* §III.B.4., ICERS, like all proposed claim representatives is more than adequate. ICERS has sat for a deposition, responded to written discovery, met with counsel and has kept itself involved and active in this litigation. ICERS is not merely a "spectator" – it has, and will continue, to actively litigate this action.

D. Plaintiffs' §12(a)(2) Claims Should Be Included Within the Single Class

Defendants ask this Court to certify nine distinct subclasses just for plaintiffs' §12(a)(2) claims. Defendants assert this vast number of subclasses is necessary because plaintiffs' §12(a)(2) claims "raise different issues and require different proof for each of the nine offerings identified in the Amended Complaint," and therefore if all the 12(a)(2) claims are litigated together, "nine separate and distinct determinations must be made concerning, among other things, the materiality of the alleged misrepresentation and the reasonableness of the underwriters' conduct." Financial Institutions' Opp. at 31.

This argument is without merit. Courts have consistently certified single classes of plaintiffs claiming violations of §§10, 11 ***and*** 12, despite the fact that these claims have slightly different elements. When there is a "common thread" of misrepresentations and omissions, the fact that there may be some differences in factual determinations does not require the creation of subclasses. *LTV*, 88 F.R.D. at 146. Here, the "common thread" requirement is easily met. Plaintiffs' §12(a)(2) claims are based on nine offerings. Each of these offerings incorporated by reference various financials of Enron from 1997-2001. These false financials are at the core of the complaint. Each device, contrivance and scheme pleaded in the complaint was aimed at falsifying Enron's financial picture –

whether it was hiding debt through special purpose entities, abusing mark-to-market accounting or engaging in prepays and forward sales contracts which were disguised loans. The facts underlying the §12(a)(2) claims are bound up with those underlying the §§10 and 11 claims. *See Zicklin v Breuer,* No. 81 Civ. 3387 (RO), 1983 U.S. Dist. LEXIS 11020, at *5 (S.D.N.Y. Dec. 8, 1983), where like here, the defendants argued, "the various claims of different purchasers encompassed within the proposed class (Sections 11 and 12(2) of the 1933 Act and Section 10(b) of the 1934 Act), and the different defenses which may be raised to these claims, are too diverse to be effectively included in a single action." The court disagreed, certifying the class and refusing to establish any subclasses. *Id.* at *5-*10. *See also In re Unioil Sec. Litig.,* 107 F.R.D. 615, 622 (C.D. Cal. 1985) ("As plaintiffs' claim is based on a common nucleus of misrepresentations ... the common questions predominate over any differences between individual class members with respect to damages, causation or reliance.").

The one case defendants cite in support of their argument, *Klien v. A.G. Becker Paribas, Inc.,* 109 F.R.D. 646, 653 (S.D.N.Y. 1986), is not dispositive. While the court in *Klien* did certify ***one*** sub-class for plaintiffs §§11 and 12 claims, it did so without any analysis, and approved the named plaintiffs and their counsel as representatives for ***both*** the class and sub-class. The court's holding in *Klien* is far less drastic than defendants' proposal of the creation of ***nine*** subclasses (just for the §12 claims) and new class representatives for each subclass.

VIII. SECTION 11 CLAIMS CAN PROPERLY BE CERTIFIED

In yet another attempt to send the victims of the Enron fraud begging for justice, the Financial Institutions and Outside Directors contend plaintiffs' 1933 Act claims require the creation

of subclasses.[33] The Outside Directors concede, however, that plaintiffs' §§11 and 15 claims are appropriate for class action treatment. *See* Outside Directors' Mem. at 17 ("Accordingly ... this Court can and should certify Plaintiffs' §11 claims and the related control person claims under Section 15.").[34] They pose only three tepid challenges to plaintiffs' proposed Class: (1) §§10, 11 and 12 claims must be chopped into separate classes;[35] (2) in addition to creating separate §§10, 11 and 12 classes, the Court should carve out seven §11 subclasses because the proposed class representatives must reflect the claim of every potential class member; and (3) defendants erroneously believe plaintiffs are not entitled to the presumption of reliance on plaintiffs' §11 claims. These arguments do not persuade.

First, the Outside Directors and the Financial Institutions offer little rationale for fragmenting the class. They do not identify any conflict between §§10, 11 and 12 claims, beyond generic assertions that they involve different securities and thus require different proof. Yet to prove each claim, plaintiffs will have to present facts regarding defendants' massive multi-year fraud. This common scheme predominates regardless of whether a plaintiff bought a note bearing 7.375% interest or 7.875% interest, or whether it purchased stock or foreign debt securities. There is no reason to split the class and require plaintiffs to prove this extensive fraud twice, let alone as many times as defendants sold securities. Numerous courts, dealing with far less complicated frauds, have agreed with this reasoning.

---

[33] Apparently, Causey, Lay, Mark-Jusbasche, Harrison and Skilling adopt this same argument. *See* Outside Directors' Mem. at 1 n.3; Response of Defendant Ken L. Harrison to Plaintiffs' Motion for Certification of Class Claims ("Harrison Opp.") at 2.

[34] The Financial Institutions do not concede a class of §11 plaintiffs can be certified, but appear to admit such a class can be certified if it meets their criteria. *See* Financial Institutions' Opp. at 33.

[35] Presumably defendants would include §15 claims in a §11 class, although they do not directly address this point.

Second, each class representative proffered by plaintiffs has standing. Yet defendants attempt to bootstrap decertification by arguing that: (1) subclasses for each of seven different securities offered by defendants are necessary; (2) a class representative must have purchased each of these securities to represent each subclass; and (3) these plaintiffs do not have standing for all seven proposed subclasses. Their circular logic unravels because subclasses are not necessary, the class representatives have standing and the class representatives do not need to have purchased the same security as each class member to represent them. Courts have routinely certified classes where class representatives did not purchase the same security as every class member. *See Enron*, 206 F.R.D. at 452 (citing *Sanders*, 634 F. Supp. at 1057); *see also* cases cited in §VII.

Finally, plaintiffs' §11 claims are entitled to the presumption of reliance for three reasons. First, defendants are wrong on the facts. The Amended Complaint clarifies when the class representatives purchased their notes and pinpoints the effective date of each Registration Statement. Five of the proposed class representatives purchased on the first day of the effective dates of the offerings. Second, defendants misread the statute. An intervening financial statement must cover a twelve month-period which ***begins*** after the effective date of the Registration Statement. Defendants' error is in simply looking to the next twelve-month financial statement ***filed*** after the effective date of the Registration Statement. Third, under Judge Cote's recent decision in *WorldCom*, financial statements which do not comply with GAAP are not intervening financial statements for purposes of §11. Under any of these three rationales, plaintiffs need not show reliance for the §11 claims. Thus they are all suitable for class action treatment and no reason supports carving out separate subclasses for them.[36]

---

[36] Defendants also concede that "proof of this unique and class-wide affirmative [due diligence] defense predominates over any individual issues" and that "[t]rying this affirmative defense on a

A. Statement of Relevant Facts

On March 12, 2003, this Court issued its ruling addressing claims asserted against certain of Enron's current and former directors, including the Outside Directors.[37] The Court identified plaintiffs' §11 claims as pertaining to the following Registration Statements:

1. May 1999 offering of Enron Corp. 7.375% Notes due 5/15/19;

2. August 1999 offering of Enron Corp. 7% Notes due 7/31/02;

3. May 18, 2000 offering of 8.735% Notes due 5/23/05 and 7.875% due 6/15/03;

4. July 2001 private placement of Enron Corp. Zero Coupon Convertible Senior Notes due 2021.

In re Enron Corp. Sec. Litig., 258 F. Supp. 2d 276, 619 (S.D. Tex. 2003). The Court dismissed plaintiffs' §10 claims against the Outside Directors. The Court also dismissed certain plaintiffs' §11 claims because plaintiffs had not pled reliance on the Registration Statements. The Court reasoned certain plaintiffs were required to show reliance due to intervening earnings statements released before plaintiffs purchased their notes.

Following the Court's ruling, plaintiffs filed the Amended Complaint. The Amended Complaint set forth each of plaintiff's §11 claims in the following chart:

Type of Offering	Offering Date	Date of Registration	Effective Date of Registration (Pursuant to 17 C.F.R. §230.158)	Defendant Underwriters	Individual Defendants/ Registration Statement Signatories	Class Representative
Enron Corp. 7.375% Notes due 05/15/2019 ($500 million)	05/19/99	02/05/99	02/05/99 (at the earliest)	Lehman Brothers, Inc., Banc of America Securities LLC, CIBC World	Lay, Causey, Fastow, Belfer, Blake, Chan, Duncan, Foy, Gramm, Harrison,	Local 175/505, Washington Board

single occasion will be dispositive of all claims in a class context." Outside Directors' Mem. at 16. They do not oppose class certification on these grounds.

[37] *In re Enron Corp. Sec. Litig.*, No. H-01-3624, Order (S.D. Tex. Mar. 12, 2003) ("March 12, 2003 Order").

Type of Offering	Offering Date	Date of Registration	Effective Date of Registration (Pursuant to 17 C.F.R. §230.158)	Defendant Underwriters	Individual Defendants/ Registration Statement Signatories	Class Represen-tative
				Markets Corp	Jaedicke, LeMaistre, Meyer, Skilling, Urquhart, Wakeham, Walker and Winokur	
Enron Corp. 7% Exchangeable Notes due 07/31/2002 ($222 million)	08/10/99	08/10/99 (Amendment No. 2)	08/10/99 (at the earliest)	Banc of America Securities LLC, Salomon Smith Barney, Inc.	Lay, Causey, Fastow, Belfer, Blake, Chan, Duncan, Foy, Gramm, Harrison, Jaedicke, LeMaistre, Mark-Jusbasche, Mendelsohn, Meyer, Skilling, Urquhart, Wakeham and Winokur	Pulsifer
Enron Corp. 7.875% Notes due 06/15/03 ($325 million)	06/01/00	02/05/99	05/15/00 (at the earliest) (the filing date of Enron's 10-Q for March 31, 2000, expressly incorporated by reference into the 06/01/00 Prospectus)	Lehman Brothers, Inc.	Lay, Causey, Fastow, Belfer, Blake, Chan, Duncan, Foy, Gramm, Harrison, Jaedicke, LeMaistre, Meyer, Skilling, Urquhart, Wakeham, Walker and Winokur	Hawaii Laborers, Archdiocese of Milwaukee, Greenville Plumbers
Enron Corp. Zero Coupon Convertible Sr. Notes due 2021 ($1.9 billion)	07/18/01	07/13/01 (Amendment No. 1)	07/13/01 (at the earliest)		Skilling, Causey, Fastow, Belfer, Chan, Blake, Duncan, Gramm, Jaedicke, Lay, LeMaistre, Mendelsohn, Ferraz, Pereira, Savage/Alliance, Wakeham and Winokur	Staro Asset Mgmt.

As the Amended Complaint makes clear, the effective dates for the actionable Registration Statements are not necessarily the same dates that the SEC accepted the Registration Statement, particularly when the initial registration was a shelf registration. ¶1008.1. Furthermore, plaintiffs have provided the date of the offering as well as the date on which each proposed class representative purchased its notes.

For two of the claims, on the Enron 7.375% Notes and the Enron 7.875% Notes, plaintiffs' proposed class representatives purchased their securities on the first day of the offering. ¶1008.1(a), (b), (d)-(f). With regard to the 7% Exchangeable Notes, the effective date is not earlier than August 10, 1999. ¶1008.1(c). Class representative Pulsifer purchased its securities on December 30, 1999. No earnings statement covering a twelve-month period or more and beginning after August 10, 1999 was issued between the time of the effective date and Pulsifer's purchase. *Id.*

As for the Zero Coupon Convertible Notes, Enron filed Amendment No. 1 to its Registration Statement on July 13, 2001. Enron's prospectus for this offering is dated July 18, 2001. Class representative Staro purchased its securities on September 27, 2001. No earnings statement covering a twelve-month period or more and beginning after July 18, 2001 was issued between the effective date of the Registration Statement and Staro's purchase. ¶1008.1(g).

B. Certifying a Single Class Is Consistent with the Goals of Rule 23 and Will Promote the Efficient Litigation of This Action

It is an understatement to say that this case involves complex issues of law and fact. Because defendants' fraud was so far-reaching, trial of these issues will be time-intensive and demanding. Multiple trials of pieces of the class case are senseless and would be an extreme strain on judicial resources. *See* Financial Institutions' Opp. at 34 ("'the class action device exists primarily, if not solely, to achieve a measure of judicial economy'").

As argued elsewhere, ample authority counsels the certification of a single class of persons with §§10, 11 and 12 claims. In *LTV*, the court certified a class consisting of purchasers of nine types of securities claiming §§10, 11 and 12 violations during a three year class period. 88 F.R.D. at 140-41. The court noted that the substantive claims had differing but overlapping elements with a "common thread" of misrepresentations and omissions, and that those elements predominated. *Id.* at 141, 146-47. The outcome was similar in *In re VMS Sec. Litig.*, 136 F.R.D. 466, 477-78 (N.D. Ill. 1991). There, defendants argued that each claim must be separated in its own subclass because each

required a "different showing of reliance." *Id.* at 477. The court disagreed, holding that "individual issues of reliance will not defeat class certification." *Id.* at 478. *See also In re Deutsche Telekom AG Sec. Litig.*, 229 F. Supp. 2d 277, 283-84 (S.D.N.Y. 2002) (certifying class of §§10, 11, 12, 15 and 20(a) claims and declining to create subclasses); *Schwartz*, 178 F.R.D. at 557 (certifying class of §§10 and 11 claims); *Endo*, 147 F.R.D. at 167-68 (certifying class of §10 and 12 plaintiffs).

Such reasoning was embraced most recently by Judge Cote in *WorldCom*, another huge securities fraud action. Judge Cote entertained a rigorous analysis of the class claims and certified a single class of persons with §§10, 11 and 12 claims. The court focused on the "pervasive accounting fraud and the correspondingly pervasive failure of those charged with monitoring and evaluating WorldCom to review diligently the company's financial records and representations, and of those who spoke of WorldCom's financial condition to do so honestly and accurately." *WorldCom,* Order at 20. The court noted "[b]oth stock and bond purchasers will necessarily seek to develop facts sufficient to prove the underlying accounting fraud at WorldCom and the dissemination of material misrepresentations regarding the company's value, and to show why the misrepresentations were made." *Id.* The court then addressed concerns similar to those raised here by defendants – questions of reliance and unique defenses to §11 claims – and found that those issues did not preclude certification of a single class.[38]

---

[38] *O'Sullivan*, cited by defendants, is not instructive. In *O'Sullivan*, plaintiffs were charged fees of differing amounts on loans negotiated by different individuals with varying terms. No facts suggested that any single loan was the same as another. 319 F.3d at 736-37. In finding that liability could only be proved on a "transaction by transaction" basis, the court reasoned that the only way to measure if there was any overcharge on each fee was to look at the amount of work put into the negotiation of each transaction. *Id.* at 742. Here, plaintiffs were all induced to purchase securities based on misrepresentations reflected in the market price of the securities. Defendants' reliance on *Castano* is misplaced. The proposed class was all persons addicted to nicotine through smoking since 1943. The plaintiffs' theories of liability had never been tried, so no one could predict how a trial on a class basis would work. Here, Lead Counsel has tried numerous securities class actions.

The facts here lead to a similar outcome. Defendants point to only the following reasons for carving out a separate §11 class: that certain §11 claims were dismissed by this Court on March 12, 2003; and that plaintiff faces different burdens of proof associated with its §11 claims. Financial Institutions' Opp. at 31-37; Outside Directors' Mem. at 14-17. As in *WorldCom*, and as set forth below, plaintiffs do not need to prove individual reliance for their §11 claims, and defendants concede that affirmative defenses and damages do not impede certification.[39] A single class should be certified.

C. The Proposed Class Representatives Have Standing to Represent the Class, and §11 Subclasses Are Not Necessary

As an initial matter, each of the proffered class representatives has standing to bring a claim in this action. That is, each of them could file an individual action against defendants asserting §11 claims arising from plaintiffs' purchase of securities sold by defendants. ¶1008.1. Each class representative purchased securities traceable to a false Registration Statement issued pursuant to a specific offering and just as all other class members, was injured thereby.

Defendants cite *U.S. Liquids* to support their argument that the proposed representatives do not have "standing" to act as class representatives because the class representatives did not purchase the same exact kind of security as other class members. Outside Directors' Mem. at 3-4, 8. That case is inapposite. The issue before the Court in *U.S. Liquids* was whether designated class

---

The manageability concerns in *Castano* simply do not exist here. *See also supra* §IV. (distinguishing *Castano*).

[39] Defendants assert with no support that §11 requires proof of scienter. Outside Directors' Mem. at 7 (claiming that the Court "has already dismissed all Section 11 claims requiring proof of reliance and scienter"). This is error. Some courts have held that Rule 9(b) requires a plaintiff to plead a §11 claim with particularity when it sounds in fraud. *Lone Star Ladies Inv. Club v. Schlotzky's Inc.*, 238 F.3d 363, 368-69 (5th Cir. 2001) (finding plaintiff's §11 claim did not sound in fraud and reversing dismissal). This is not equivalent to demanding proof of scienter, or proof of defendants' state of mind. This Court made no reference to a requirement that plaintiffs plead scienter in its Order.

representatives had demonstrated their shares of common stock were traceable back to the offering that was the subject of the lawsuit. 2002 U.S. Dist. LEXIS 26714, at *29. Initially, plaintiffs in that case had failed to provide evidence the class representatives had acquired their stock directly in the secondary offering. Therefore, the Court held plaintiffs did not meet their burden of proof on standing as to the named class representatives. *Id.* at *26. Once plaintiffs provided evidence that the class representatives had purchased their stock from shares issued in "the Secondary Offering, as opposed to the pre-existing pool of five million plus shares," the Court found the class representatives adequate. *Id.* at *29.

There is no dispute that class representatives in the present case acquired their securities from the offerings which are the subject of this lawsuit. Instead, the issue before the Court is whether typicality exists between the proffered class representatives and the class such that each class representative has individual standing to raise the legal claims of the class. The class representatives, as well as the class members, purchased inflated securities sold by defendants and have been injured by defendants' fraud.

There is no requirement "the Section 11 representative must have purchased the same security as the class it seeks to represent in order to have 'individual standing to raise the legal claims of the class.'" Outside Directors' Mem. at 3. As noted in plaintiffs' opening brief, "plaintiffs need not name a representative of the class for each subgroup of securities, where common issues predominate as to all securities." *ACC/Lincoln,* 794 F. Supp. at 1461. This Court observed in *Enron* and the Fifth Circuit agrees,

> "The test for typicality is not demanding. It focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent. Typicality does not require a complete identity of claims. Rather, the critical inquiry is whether the class representative's claims have the same essential characteristics of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality."

206 F.R.D. at 446 n.10 (citing *Stirman,* 280 F.3d at 562). "Furthermore courts have repeatedly concluded that stock purchasers can represent purchasers of debt instruments and vice versa in the same action." *Enron,* 206 F.R.D. at 445.[40] "Purchasers of common stock may adequately represent purchasers of preferred stock where, as in this action, claims arise from a common course of conduct." *Id.* at 446.

Here, the claims of the class representatives and the class members arise from the same set of facts and are based on common legal theories. There is no substantial difference between persons who bought 7.375% Notes and those who purchased Zero Coupon Convertible Notes just as there is no substantial difference between purchasers of 7.875% Notes and purchasers of 7% Exchangeable Notes. All are seeking to recover damages as a result of defendants' common scheme and course of conduct which artificially impacted the market price for Enron's securities. The creation of separate subclasses is unnecessary when typicality already exists, as in this case, between the class and the named representatives.

Defendants cite *Taxable Mun. Bonds,* 51 F.3d at 521-22, for the proposition that in the Fifth Circuit, standing must be established at the class certification stage. Outside Directors' Mem. at 3. But in that case, the plaintiff did not have standing to bring any claim whatsoever. Thus, it was an issue to be addressed at ***any*** stage of the litigation. As this Court has previously held, class

---

[40] *See also Saxon,* 1984 U.S. Dist. LEXIS 19223, at *18 ("'debenture holders have an interest identical to that of the holders of common stock in demonstrating a common course of fraudulent conduct and in implicating defendants in that conduct'"); *Epstein,* 1988 U.S. Dist. LEXIS 5450, at *8-*9 (same); *Handwerger v. Ginsberg,* No. 93 Civ. 4832 (HFW), 1975 U.S. Dist. LEXIS 14546, at *4-*5 (S.D.N.Y. Jan. 2, 1975) (in a securities class action lawsuit, court held that since there was no substantial difference between debenture holders and stock holders because both were seeking to recover damages as a result of misrepresentations, the plaintiff, a debenture holder, can represent a class of both debenture holders and stock holders); *Deutschman v. Beneficial Corp.,* 132 F.R.D. 359, 368-75 (D. Del. 1990) (purchasers of call options may also represent stock purchasers); *Clark v. Cameron-Brown Co.,* 72 F.R.D. 48, 53 (M.D.N.C. 1976) (common stock holder may also represent warrant holder).

representatives must show that they personally have been injured. *U.S. Liquids*, 2002 U.S. Dist. LEXIS 26714, at *16-*18. Other Fifth Circuit cases which address standing also ask whether or not the class representative is a member of the class it seeks to represent. *James*, 254 F.3d at 563-63.

Here, all of the proposed representatives are class members. The only class representative faced with a plausible challenge to standing is Staro.[41] Defendants claim that Staro does not have standing to bring its claims because the record holders for the purchasers of the Zero Coupon Convertible Notes were three funds managed by Staro. Outside Directors' Mem. at 13; Opposition of Defendant Alliance Capital Management L.P. to the Appointment of Staro Asset Management, LLC as Class Representative at 13-15. As is discussed in §XI, Staro is a proper representative. Regardless, Outside Defendants concede that the three funds – Stark, Shepherd and Reliant – are adequate representatives.[42] Plaintiffs seek leave to substitute these funds in as class representatives, if need be.

In the end, the Outside Directors concede that "it is largely a matter of semantics whether the Court certifies a single Section 11 class – with separate subclass representatives for each note offering – or separate classes for each note offering." *See* Outside Directors' Mem. at 8 n.11.[43]

---

[41] While defendants claim that "the same need to substitute real parties in interest plagues the claims by Amalgamated Bank," they provide no supporting argument or evidence. Outside Directors' Mem. at 14. For the same reasons stated regarding Staro, *infra*, Amalgamated has standing.

[42] Defendants "believe that the Staro-advised funds (Stark, Shepherd and Reliant) – if they demonstrate purchases pursuant to the registration statement – are adequate representatives for the Zero Coupon purchaser class because their trading records established that they actually purchased Zero Coupon Convertible Notes after the registration statement was issued." Outside Directors' Mem. at 14 n.20 (emphasis omitted).

[43] Additionally, the Outside Directors assert plaintiffs' complaint "recognizes that subclasses are required under Section 11." Outside Directors' Mem. at 4-5 & n.7. Plaintiffs' complaint does nothing of the sort. What plaintiffs' Amended Complaint does do is clearly (but merely) detail and explain which claims it is referencing. *See* ¶¶986, 1006, 1014-1015.

Unless defendants are serious that all of these classes and subclasses require separate trials (and this is doubtful from defendants' briefs), it is equally semantic as to whether or not separate classes are certified.

D. The Proposed Class Does Not Include Claims Dismissed by the Court

1. The Amended Complaint Pleads §11 Claims for the 7.375% and 7.875% Notes

The Outside Directors claim that this Court's Order of March 12, 2003, should curtail the class period for claims associated with certain bonds. This ignores the facts in the Amended Complaint. Each proposed class representative purchased its securities following the effective date of the Registration Statements and prior to the issuance of a triggering financial statement. ¶1008.1.

For the claims arising from the Enron 7.375% Notes and the Enron 7.875% Notes, plaintiff's proposed class representatives (Teamsters 175 & 505, WSIB, Hawaii Laborers' Pension Fund, AMS Fund and Greenville Plumbers Pension Plan) purchased their securities on the first day of each offering. ¶¶1008.1(a)-(b), (d)-(f). Thus no intervening financial statement was filed which would require the representatives to plead individual reliance on the Registration Statements.[44] Thus, contrary to defendants' arguments (Financial Institutions' Opp. at 24), individual reliance is not an element they must prove for their §11 claim.

2. The Amended Complaint Pleads Claims for the 7.0% Notes and the Zero Coupon Convertible Notes

A §11 plaintiff need not show reliance unless he purchases after an issuer has made available "an earning statement covering a period of at least twelve months ***beginning after*** the effective date of the registration statement." 15 U.S.C. §77k(a). That is, the earnings statement that triggers the

---

[44] It was not clear in the Consolidated Complaint, which was the subject of the March 12, 2003 Order, that Enron used a shelf registration statement to sell numerous sets of notes. As explained in the Amended Complaint, the offerings of notes that these plaintiffs bought were first issued on May 19, 1999 and June 1, 2000 respectively.

reliance requirement must cover a full 12-month period that ***begins*** after the effective date. For example, for a registration with an effective date of February 1, 2000, the triggering earnings statement is not the next-filed earning release, such as the 10K for the year 1999. Instead, the triggering earnings statement is the earnings release covering the time period beginning after February 1, 2000 and covering a full 12 months – or the 2001 10K filed in March 2002 (assuming no earnings statement other than a 10K is issued in the intervening period). The rationale for this rule is that an investor armed with a year's worth of additional financial information may indeed be relying on a total mix of information that is far removed from that contained in the Registration Statement.

Defendants, however, apparently read the statute by substituting the word "filed" for "beginning." They conclude it is simply the filing of the next 12-month earning release that triggers the need to show reliance. *See* Financial Institutions' Opp. at 33; Outside Directors' Mem. at 10. Under this logic, an earnings release filed the day after the effective date of a registration statement would shift the burden to plaintiff. Their interpretation is simply inconsistent with the statute.

The Zero Coupon Convertible Notes were purchased by Staro on September 27, 2001 pursuant to Amendment No. 1 to Enron's Registration Statement on July 13, 2001. Enron's prospectus for this offering is dated July 18, 2001.[45] No earnings statement covering a 12-month period that began after July 18, 2001 was issued between the effective date of the Registration Statement and Staro's purchase. ¶1008.1(g).

With regard to the 7% Exchangeable Notes, the effective date is not earlier than August 10, 1999. ¶1008.1(c). Class representative Pulsifer purchased its securities on December 30, 1999

---

[45] The effective date for a §11 registration statement is not triggered by a shelf registration, but rather by the date of the last post-effective amendment pursuant to which the buyer purchased the securities. 17 C.F.R. §229.512(a)(2); *Finkel v. Stratton Corp.*, 962 F.2d 169, 174 (2d. Cir 1992).

pursuant to that publicly-filed Registration Statement.[46] No earnings statement covering a 12-month period or more was issued between the time of the effective date and Pulsifer's purchase. *Id.* Pulsifer does not need to plead reliance.[47]

3. Enron's Financial Reporting Violated GAAP and Thus Its Financials Are Not "Earnings Statements" Within the Meaning of 15 U.S.C. §77k(a)

For a financial statement to qualify as an earning statement under §11, it must be prepared in accordance with GAAP. This is intrinsic to the definition of "earning statement." *WorldCom,* Order at 53 (citing 17 C.F.R. §210.4-01(a); Definition of Terms, Securities Act of 1933 Release No. 33-6485, 1983 SEC LEXIS 717, at *6 (Sept. 23, 1983)). The *WorldCom* court concluded that "[a]n earning statement that violates the SEC filing requirements should not be considered an 'earning statement' for purposes of Section 11." *WorldCom,* Order at 53. This conclusion flows logically from the proposition that a fraudulent financial report is not an earnings statement, and the burden should not shift to plaintiff to show reliance.

The financial statements at issue in this litigation did not comply with GAAP, by Enron's own admission. Enron announced that it was restating its financial results for 1997 through 2000 to eliminate $600 million in previously reported profits and roughly $1.2 billion in shareholders'

---

[46] This Court earlier considered whether Pulsifer's §11 claim could be maintained due to the existence of a private placement memorandum. *Enron,* 258 F. Supp. 2d at 642. The Amended Complaint makes plain that Pulsifer purchased pursuant to the Registration Statement.

[47] In a footnote, the Outside Directors assert the Texas Securities Act ("TSA") claims against them asserted in the WSIB complaint suffer "from the same fatal deficiencies that plagued" the TSA claims against the Outside Directors in the *Newby* complaint. Outside Directors' Mem. at 7-8 n.10. The Outside Directors are mistaken. First, Lead Plaintiff's Amended Complaint only asserts TSA claims against JP Morgan, Lehman Brothers, Buy, Causey, Fastow, Lay and Skilling. Second, the WSIB complaint does not assert TSA claims against any defendants. Notwithstanding the Outside Directors misreading of the WSIB complaint and Amended Complaint, Lead Plaintiff has cured any pleading defects with regard to the TSA claims pled in the Amended Complaint. *See* ¶¶1016.10-1016.28.

equity. ¶384. Accordingly, Enron's financial statements for 1997 through 2000 could not qualify as "earnings statements" under §11.

Moreover, plaintiffs' §10(b) allegations upheld by this Court claim that Enron's financial statements were false. Each of the Registration Statements at issue expressly incorporates these false financial statements. *See, e.g.*, Ex. 34 at 8-9 (Prospectus Supplement filed June 1, 2000 on 7.875% Notes) (Providing "[t]he SEC allows us to 'incorporate by reference' the information we file with them, which means that we can disclose important information to you by referring you to those documents.... We incorporate by reference the documents listed below and any future filings made with the SEC ...."; listing Enron's 1999 10K, its first quarter 10Q for the quarter ended March 31, 2000, among other documents); Ex. 35 at 11-15, 40-42 (Prospectus filed August 10, 1999 on 7.0% Exchangeable Notes) (referring to Enron's audited financial statements for the year end 1998); Ex. 36 at 5 (Registration Statement filed July 18, 2001 on Zero Coupon Convertible Senior Notes due 2021) (noting "[t]his prospectus is part of a registration statement that we filed with the SEC utilizing a 'shelf' registration process..."); *id.* at 3 ("We file annual, quarterly and special reports, proxy statements and other information with the Securities and Exchange Commission," referring purchasers to the SEC's website, and expressly incorporating Enron's 2000 10-K and 10-Q for the quarter ending 3/31/01); Ex. 37 at 8-9 (Prospectus filed May 19, 1999 on 7.375% Notes) (incorporating by reference Enron's SEC filings using similar language).

E. Common Issues Overwhelm Any Individual Issues Relating to Affirmative Defenses or Damages

Defendants contend issues regarding individual defenses and damages under §11 require the creation of subclasses. Financial Institutions' Opp. at 34-36; Outside Directors' Mem. at 14-17. As previously noted, for numerous reasons, defendants are wrong. For "'[i]n determining the propriety of a class action, the question is not whether the plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of rule 23 are met.'" *Eisen*, 417 U.S. at

177-78. Accordingly, issues of damages and affirmative defenses in no way effects the class certification analysis.

Even if the Court could examine these issues during its class certification inquiry (it cannot) defendants' arguments would still fail. The Financial Institutions contend because they will have "due diligence defenses that raise different factual issues for each offering," that certifying a single class is inappropriate. Financial Institutions' Opp. at 36. Nonsense. Defendants' due diligence defenses will not in any way be affected by the certification of a single class. The Outside Directors concede that the due diligence defense triggers no issues that call class certification into doubt. Outside Directors' Mem. at 16 ("Accordingly, there is no question that the proof of this unique and class-wide affirmative [due diligence] defense predominates over any individual issues."). Indeed, defendants will have exactly the same opportunity to prove this affirmative defense. *See Schlotzsky's*, 238 F.3d at 369 (under §11 due diligence "is an affirmative defense that must be pleaded and proved").[48]

Similarly, the Financial Institutions' argument that "distinct issues of loss causation," for the three different securities offerings requires the creation of subclasses is misplaced. Financial Institutions' Opp. at 36. As defendants note, they are required to prove this affirmative defense. *Id.* Like defendants' due diligence defense, the certification of a single class will in no way affect defendants' opportunity to prove this affirmative defense.[49]

---

[48] Yet even if separate questions of fact did arise, these are issues not appropriate for resolution at class certification, but are reserved for the finder of fact. As this Court has acknowledged, such issues may become a question of law only where undisputed facts force a single conclusion. *Enron*, 258 F. Supp. 2d at 597. Here, defendants have presented the Court with no facts to suggest anything other than that these issues raise no challenges to plaintiffs' motion for class certification.

[49] Moreover, as noted above, because plaintiffs here have alleged a common scheme to defraud through the class period, this case is especially suited for certification as a single class and subclasses are not necessary. Defendants' cases are not to the contrary. In *Levine v. Am. Ex. Indus., Inc.*, No.

Plaintiffs also concur with the Outside Directors' conclusion that the calculation of damages on §11 claims does not require a separate trial:

> In contrast to [*O'Sullivan*], Section 11 is not a claim on which individual calculations of damages will swamp the efficiencies to be gained from class certification. While the calculation of damages under Section 11 is individual, in the sense that it requires proof of purchase price and sales price by each plaintiff, 15 U.S.C. §77k, it is in every sense formulaic. *See* [*Bell Atl.*, 339 F.3d at 306-07] (recognizing that courts have certified classes where damages vary, so long as they are "susceptible to a mathematical or formulaic calculation.").

Outside Directors' Mem. at 16-17. Thus, neither defenses nor damages raise certification concerns.[50]

F. Manageability Concerns Counsel the Certification of a Single Large Class, Not Multiple Classes and Subclasses

There are compelling reasons in this complicated case to simplify, not stratify, this litigation. It is difficult to tell whether defendants actually believe that separate trials are necessary for each of their proposed subclasses – and if they are not, what the purpose of such chopped subclasses would be. *Compare* Outside Directors' Mem. at 8 n.11 ("[I]it is largely a matter of semantics whether the Court certifies a single Section 11 class – with separate subclass representatives for each note offering – or separate classes for each note offering.") *with id.* at 6 ("no manageable trial plan can be formed for such a broad, amorphously described 'class'").

---

71 Civ. 5128, 1976 U.S. Dist. LEXIS 17277 (S.D.N.Y. Jan. 8, 1976), the court did not certify a single class because plaintiffs had not alleged a "'common course of conduct' so as to justify the certification of one class." *Id.* at *7-*8 (observing that cases which contain such "common course of conduct" allegations, like here, frequently certify a single class). For the same reason, defendants reliance on *Klein*, 109 F.R.D. at 653, is also misplaced.

[50] Likewise, the Financial Institutions' argument that different false statements in varying offering documents render certain class representatives atypical lacks merit. Financial Institutions' Opp. at 34-36. As discussed throughout this brief and in detail at *supra* §IV., the claims of such a plaintiff are typical of the claims of the class if all the information relied upon is part of a common course of conduct or common scheme to defraud. 7 *Newberg on Class Actions* §22:26. Because plaintiffs here have alleged a common scheme to defraud throughout the Class Period, it makes no difference which version of the Enron's phony financials a particular plaintiff may have relied on.

It is obvious that it will be more efficient to conduct a single trial than multiple trials. When it suits them, defendants agree: "For parties with limited insurance coverage, and for whom the issues will in all sense be identical for every Section 11 claim, [trying due diligence defenses separately] is hardly efficient." Outside Directors' Mem. at 16. While the *Castano* case clearly counsels the Court to consider manageability issues, *Castano* involved certification of "all nicotine dependent persons in the United States" since 1943. 84 F.3d at 737. Thus questions of individual reliance affected case manageability. *Id.* at 745 (citing *Simon*, 482 F. 2d 880). What is more, the action raised issues of state law such that liability might vary from state to state. *Castano*, 84 F.3d at 743. No such concerns are raised here, where individual reliance need not be proven, and liability turns on federal law.

IX. SECTION 20A CLAIMS CAN PROPERLY BE CERTIFIED

A. Every Prerequisite for §20A Class Certification Is Met

Certain individual defendants against whom is pled a claim regarding §20A of the 1934 Act have filed a separate brief urging the Court not to certify a class that contains claims based on defendants' violation of insider trading rules. Certain Individual Defendants' Opposition to Class Certification With Respect to Plaintiffs' §20A claims ("§20A Opp.").[51] This argument, which is yet another variation on the theme trumpeted by all the defendants opposing class certification, posits, in essence that the Enron debacle is so big there can be no justice for the wronged. But, as demonstrated above, this case can be tried as a class action. The §20A claims should fare no differently. Every prerequisite for certification exists as to these claims as it does for those under §§10(b), 11 and 12.

---

[51] Defendant Harrison has joined in that response. Harrison Opp. at 1.

As to the first requirement, there is simply no issue in this case as to whether numerosity is satisfied. Although the exact number of persons in the class with §20A claims is unknown, it clearly numbers in the many thousands. ¶987. Such a showing is sufficient as "[p]laintiffs are permitted to reasonably approximate the size of the class to satisfy their burden." *Henry v. Cash Today, Inc.*, 199 F.R.D. 566, 569 (S.D. Tex. 2000) (Harmon J.). Indeed, defendants concede that Enron's average trading volume during the class period was 4,967,622 shares per day and that defendants traded on 244 different days suggesting an extremely large group of §20A plaintiffs that is almost synonymous with the §10(b) class in this case. §20A Opp. at 18 n.5.

Similarly, plaintiffs easily meet the "commonality" test. "The second prerequisite, commonality, or shared issues of law and fact, is not a high burden." *U.S. Liquids*, 2002 U.S. Dist. LEXIS 26714, at *10. "Commonality is satisfied where there is 'at least one issue whose resolution will affect all or a significant number of the putative class members.'" *Durrett*, 150 F.R.D. at 557-58 (quoting *Stewart v. Winter*, 669 F.2d 328, 335 (5th Cir. 1982)). In this case, there are at least two common issues that predominate in the context of the §20A claims, namely: (1) whether defendants violated §10(b); and (2) whether defendants traded contemporaneously with plaintiffs.

Plaintiffs have also demonstrated that the proposed class representatives' claims are typical. "The test for typicality, like commonality, is not demanding." *Durrett*, 150 F.R.D. at 558. "It mandates that the members have the same interests and have suffered the same injuries as others in the putative class." *U.S. Liquids*, 2002 U.S. Dist. LEXIS 26714, at *10. "The court focuses on the legal and remedial theories of the named plaintiffs and the class members they seek to represent." *Id.* at *10-*11. In this case, each class representative's and each class member's claim arises out of their investment in Enron stock contemporaneously with defendants' sale of stock. Thus, typicality is satisfied. *See Rubenstein*, 162 F.R.D. at 538 (named plaintiffs' claims are typical "because they invested in [the defendant company] ... just as the potential class members did").

Notably, the issue of typicality was recently considered in the *WorldCom* case. There the court held that for a showing of typicality, "[t]he factual background of each named plaintiff's claim need not be identical to that of all the class members as long as 'the disputed issue of law or fact occup[ies] essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class.'" *WorldCom*, Order at 19 (quoting *Caridad*, 191 F.3d at 293). Here typicality is met.

The adequacy element is also satisfied. "To satisfy the adequacy requirement of class certification, Plaintiffs must [show] that "'the representative[s] will vigorously prosecute the interests of the class through qualified counsel.'"" *Dartley*, 2001 U.S. Dist. LEXIS 20631, at *5. The Fifth Circuit recognizes that class certification adequacy standards have not been changed by the PSLRA. And the Court has held and the Fifth Circuit pronounced emphatically "that it has not 'created an additional, independent requirement for the adequacy standard for class certification under Federal Rule of Civil Procedure 23 by reading the provisions of the [PSLRA] into Rule 23(a)(4)' nor 'changed the law of this Circuit regarding the standard for conducting a Rule 23(a)(4) adequacy inquiry.'" *U.S. Liquids*, 2002 U.S. Dist. LEXIS 26714, at *13 n.4 (quoting *Berger*, 279 F.3d 313).

Defendants' attempt to misquote and deride a few of the §20A class representatives is particularly troubling as these individuals are not lawyers and have volunteered to represent thousands of defrauded investors without any special compensation – a civic contribution in this era of unparalleled corporate fraud. The failure of these moving defendants to raise any real adequacy objection further underscores the wasteful nature of the 23 day-long depositions that took place during August and September 2003.

This action also satisfies the predominance requirements of Rule 23(b)(3). Predominance, in the context of Rule 23, means those issues or defenses claimed on behalf of the class ought to be

superior to and unencumbered by any individual claims or issues that may affect the lawsuit. Rule 23, however, does not require each issue in the case to be similar for all class members only that common questions predominate over individual issues. *Longden*, 123 F.R.D. at 556. "Predominance will be established if 'resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof.'" *WorldCom*, Order at 38 (citing *Moore*, 306 F.3d at 1252). All of the claims arise from the same fraudulent scheme that affected all proposed class members. *Durrett*, 150 F.R.D. at 560. It is also true that common questions of law and fact will predominate as to likely defenses that will be presented at trial. *WorldCom*, Order at 51 n.30.

The Fed. R. Civ. P. 23(b)(3) superiority element is also clearly met here. The class action device is a superior method for resolving plaintiffs' claims because it provides the fairest and most efficient adjudication. Indeed, here it may be the only way to resolve thousands of persons' §20A claims. Securities class actions are both cost effective and manageable. As noted above, courts in the Fifth Circuit recognize the efficacy of the class action device for redressing injury to large groups of individuals harmed by a common set of operative facts. "It is desirable that securities fraud cases involving a large number of plaintiffs with small individual claims proceed as class actions ...." *Keasler*, 84 F.R.D. at 368.

B. Defendants' Opposition Arguments Do Not Undermine Plaintiffs' Showing in Support of Class Certification

1. Plaintiffs Have Standing to Bring §20A Claims on a Classwide Basis

Defendants argue plaintiffs do not have ***standing*** to bring a §20A claim on a class-wide basis. This is incorrect. There is no question the individual class representatives have standing to bring suit. This Court's March 12, 2003 Order made clear that in order to have standing for a §20A

claim, plaintiffs must show that they "'contemporaneously with the purchase or sale of securities that is the subject of such violation [purchased] securities of the same class' as the insider defendant." *Id.* at 31-32 (citing 15 U.S.C. §78t-1(a)). There is no question in this case that the class representatives themselves have standing or can prove damages – a point that defendants do not apparently dispute.[52]

Defendants' argument, however, appears to adopt the more radical conclusion that a class representative cannot *per se* have standing to represent other class members under §20A. Along these lines, defendants assert that a §20A "standing inquiry is inherently individualized, because it depends on when the individual claimant purchased and sold the stock in question, and whether and to what extent the price of the stock was inflated at the time of the purchase." §20A Opp. at 3. Notably, defendants fail to provide even one case in support of the remarkable legal conclusion that a class cannot be certified for §20A claims. That is because there are no cases that say this. To the contrary, there are clearly securities cases that have certified a §20A class. *See, e.g., In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 656 n.4 (E.D. Va. 2001); *In re Gupta Corp. Sec. Litig.*, No. C 94-1517 FMS, 1995 U.S. Dist. LEXIS 22093 (N.D. Cal. Apr. 17, 1995).[53]

---

[52] Defendants argue plaintiffs "may assert that the fact that each of the §20A defendants served at some point on the Management Committee is sufficient to demonstrate that they, as a group, possessed material non-public information." §20A Opp. at 8 n.3. The §20A defendants argue this argument is "belied, however, by the fact that many members of the management committee are not named as defendants in this claim." *Id.* A similar argument was raised, and rejected by the Outside Directors during the motions to dismiss. There, the Court noted the argument was "weak." This was because "Plaintiff is the master of its complaint and may assert or not assert claims against its defendants as it chooses, as long as the claims against each defendant satisfy the pleading standards of the relevant law and rules." March 12, 2003 Order at 62 n.32.

[53] In most of these cases, the class certification decision was unpublished. However, the above published decisions all make clear that a §20A class has been certified in the case. *See, e.g., In re Gupta Corp. Sec. Litig.*, No. 94-1517-FMS, Order (N.D. Cal. May 16, 1995) (unpublished order granting class certification) (Ex. 38).

Indeed, it is clear that defendants' argument would prove too much if accepted. The types of "inherently individualized" issue raised by defendants – the date and price of purchase – describe the garden variety claims application process in any securities case. Similarly, the extent of inflation of a stock's price during the class period is exactly the type of question answered by expert testimony that is typical of securities cases and will be conducted in any §10(b) securities case. *Texas Int'l*, 114 F.R.D. at 43 ("Proof of damages can be demonstrated on a classwide basis by the use of a generalized or formulary approach.... Once the jury determines the formula for damages, the determination of damages sustained by individual class members usually involves only the mechanical task of applying a formula to the date and amount of each individual's purchase."). Defendants have not shown how §20A claimants are on a different footing from any other claimants in any other securities case or why this suggests that no class should be certified. Hence, defendants' theory is essentially an attack on all securities class action certifications.

Defendants attempt to create confusion by providing hypothetical examples of potential claimants that they claim have not been damaged. §20A Opp. at 3. However, defendants make no attempt to suggest that their hypothetical examples apply to any of the class representatives in this case nor why the normal securities claims process could not resolve class member claims efficiently and accurately. Again, the exact same argument can be made with regard to any securities case and the same solution – an administrative claims process – is the answer in those cases as well as here.

The core of defendants' argument appears to lie with defendants' implicit assumption that for a class to be certified the class representatives and each claimant must represent ***identical***, not merely similar, claims. This court has already rejected a similar argument in the context of the lead plaintiff motion. *Enron*, 206 F.R.D. at 441 (in selecting The Regents as Lead Plaintiff, the Court determined that Lead Plaintiff's claims need not be identical to those of the class, and that they need not have purchased the exact same type of security as other members of the class). Class

representatives are entitled to represent all purchasers of the security and even related securities whose claims are similar.[54]

Moreover, because the claims under §20A are effectively identical to the §10(b) claims (with the sole addition of the ministerial task of demonstrating a contemporaneous sale requirement) any of the proposed §10(b) or §20A representatives can clearly serve as a class representative. This was essentially the holding of Judge Cote in her recent decision to grant class certification to a single class encompassing several separate, but related claims (§§10b, 11 and 12(a)(2)).

2. Plaintiffs Clearly Can Demonstrate §20A Liability by Means of Classwide Proof

Defendants argue that plaintiffs cannot rely upon a classwide proof to establish §20A liability. Defendants' argument is wrong and is wholly dependent upon a mis-citing of this Court's March 12, 2003 Order.

In particular, defendants argue the Court held:

> To establish a §20A claim, a plaintiff must prove that a defendant (1) used material, nonpublic information, (2) knew or recklessly disregarded that the

---

[54] *See, e.g., Blackie*, 524 F.2d at 911 n.27 (court rejected the contention that conflicts between debenture holders and shareholders required decertification); *Endo*, 147 F.R.D. at 167-68 (where a purchaser of common stock sought to represent a class purchasers of debentures and notes as well as common stock, the court found that purchasers' claims were typical, regardless of the type of security purchased, because all of the claims arose out of the same allegations and omissions); *Epstein*, 1988 U.S. Dist. LEXIS 5450, at *8-*9 (typicality found to exist when a debenture purchaser sought to represent purchasers of common stock, debentures); *Trafton v. Deacon Barclays de Zoete Wedd Ltd.*, No. C-93-2758-FMS, 1994 U.S. Dist. LEXIS 20971, at *29 (N.D. Colo. Oct. 19, 1994) (where claims are based on the same or similar misrepresentations, stock purchasers may represent debenture holders); *In re Waste Mgmt., Inc. Sec. Litig.*, 128 F. Supp. 2d 401, 432 (S.D. Tex. 2000) (in selecting a lead plaintiff, the court held that a substantial investor in both common stock and debentures could adequately represent the claims and defenses of the putative class); *Teichler*, 1988 U.S. Dist. LEXIS 16448 (a class of debenture holders and stockholders was certified, even though no class representatives were debenture holders, because no actual conflict existed between debenture holders and stockholders); *Green*, 406 F.2d at 295, 301 (court permitted shareholders to represent both shareholders and holders of debentures).

> information was material and nonpublic, and (3) traded contemporaneously with the plaintiff in the same class of security.

See §20A Opp. at 4 (misconstruing March 12, 2003 Order at 31-32).

Defendants rely upon this assertion to argue that plaintiffs' §20A showing will require an individual demonstration that each plaintiff "traded on different days, contemporaneously with different defendants, who possessed different types and amounts of information, about different aspects of Enron's business, which may or may not have been material and/or nonpublic." §20A Opp. at 4. Defendants' argument is based upon a obvious misquote of this Court's March 12, 2003 order.

This Court's actual opinion at pages 31-32 lists two, not three, very different requirements for pleading a §20A claim:

> To plead a §20A cause of action, the plaintiff must (1) allege a requisite independent, predicate violation of the Exchange Act (or its rules and regulations), *e.g.*, §10(b), and (2) show that he has standing to sue under §20A because he "contemporaneously with the purchase or sale of securities that is the subject of such violation has purchased ... or sold securities of the same class" as the insider defendant.

Id. (citing 15 U.S.C. §78t-1(a)).

Hence, the Court's order is clear – all that is required for a §20A violation is to: (1) prove a §10(b) violation; and (2) provide a showing of a contemporaneous purchase. As such, defendants' additional asserted requirements have no basis in a §20A claim nor can they serve as the basis for denying §20A certification.

As demonstrated by this Court's prior orders, plaintiffs have adequately pled a §10(b) violation in this case and there is no reason to believe – nor do the individual defendants propose any reasons – why a §10(b) class could not be certified. Indeed, any such argument would fly in the face of decades of class certification decisions in the §10(b) context. Thus, the only remaining rationale

that is unique to §20A and which could serve as the basis for a denial of class certification under §20A involves plaintiffs' showing of "contemporaneous trading."

There is nothing however, about the contemporaneous trading requirement that would suggest this issue cannot be litigated on a class-wide basis. In particular, to meet the "contemporaneous" trading requirement, the Court ruled plaintiffs must demonstrate that plaintiffs' trades occurred between two to three days and one week after defendants' trade. March 12, 2003 Order at 35 ("this Court finds that two or three days, certainly less than a week, constitute a reasonable period to measure the contemporaneity"). Given this guidance, determining whether trades are contemporaneous is a simple mechanical calculation. In particular, plaintiffs need only prove the date of defendants' trade and show that plaintiffs' trades occurred within a set number of days subsequently. Towards this proof, defendants' trading information is a matter of public record and is judicially noticeable. Indeed, this trading information may be proven by submission into the record of defendants' SEC filed Forms 4 and 5. Plaintiffs have no reason to believe that defendants will fail to admit these facts as denial may subject them to criminal penalties under 18 U.S.C. §1001 and 15 U.S.C. §78ff for falsifying forms filed with the SEC.

Similarly, it is uncontested that the proposed class representatives purchased stock contemporaneously with defendants. Plaintiffs' trading records are readily identifiable and have already been provided as part of the class certification discovery process. Further, a jury could find the existence of contemporaneous trading simply by considering evidence of the trading volume of Enron stock during the class period. As to each individual claimant, the normal class action claims administration process, guided by this Court and the jury's findings, is perfectly capable of making determinations as to each claimant's sales. Hence, it is simply not true that plaintiffs will not be able to prove liability under §20A on a class-wide basis.

Defendants' counter-arguments all rely upon the above misquote of this Court's ruling regarding §20A. In particular, defendants provide a lengthy chart purporting to demonstrate the "variety" of defendants' responsibilities and trading patterns." §20A Opp. at 6-7. Based upon this chart, defendants argue "no collective determination can be made as to whether the defendants, as a group, possessed material nonpublic information at the time of any given trade." *Id.* at 8. Again, this argument misses the point. There is no separate requirement under §20A for plaintiffs to demonstrate that as to each day, defendants had "actual knowledge," demonstrate that this knowledge was "non-public" or demonstrate that that these facts were "material," as suggested by defendants. *Id.* at 8. All that is required is a showing of a §10(b) violation coupled with uncontestable trading records.[55]

Since these basic elements of plaintiffs' §20A claims are provable on a class wide basis, defendants' conclusion that the class cannot be certified on this basis fails.

3. Section 20A Damages Can Be Proven on a Class Basis

Defendants argue that the "damages in question are transaction-specific, and thus must be separately determined as to each defendant and each trade at issue." §20A Opp. at 9. This argument is a complete red herring.

Courts have consistently rejected the argument that individual damages questions prevent class action certification as discussed previously. It is well settled that "differences in individual questions of reliance and amount of damages are not grounds for refusing to permit an action to proceed as a class action." 7 *Newberg on Class Actions* §22:64 at 300. Hence, "[I]t uniformly has

---

[55] In the context of plaintiffs' §10(b) showing, plaintiffs will be demonstrating defendants had "scienter" and held "material non-public" information. However, contrary to defendants' suggestion, such a showing will be conducted on a class-period basis and no day-by-day showing will be required.

been held that differences among the members [of a class] as to the amount of damages incurred does not mean that a class action would be inappropriate." 7B *Federal Practice and Procedure*: Civil 2d §1781 at 8.[56] *See* discussion *supra* §IV.B.1.[57]

Class members in the present action need only prove on a class-wide basis that defendants artificially inflated the price they paid for Enron stock through their common scheme of material misrepresentations and omissions. There is absolutely no need for extensive methods of calculating the damages of individual class members. Rather, like every other securities class action case, claimants at the end of the case will simply submit a claim form to the claims administrator who will apply a formula based on the jury's findings on whether plaintiffs have been harmed and by how much.[58]

Indeed, there are additional reasons why defendants' arguments are especially out of place in a §20A setting. Here, the damage calculation is made extremely easy because §20A damages are capped by the "profit gained" by the defendant in their transactions. 15 U.S.C. §78t-1(b)(1). Defendants attempt to raise entirely hypothetical and unrealistic concerns that this cap may not be reached. §20A Opp. at 9. This is essentially an impossibility given Enron's trading volume which defendants admit equals almost five million shares a day. *Id.* at 18 n.5. Such a trading volume

---

[56] *First Republicbank*, 1998 U.S. Dist. LEXIS 11139, at *24 n. 14 ("Differences among class members' damages is inherent in securities litigation, but do not render individual questions predominate nor defeat class action treatment."); *Gold Strike Stamp Co. v. Christensen*, 436 F.2d 791, 798 (10th Cir. 1970) ("The fact that there may have to be individual examinations on the issue of damages has never been held ... a bar to class actions."); *Blackie*, 524 F.2d at 905 ("The amount of damages is invariably an individual question and does not defeat class action treatment."); *Koenig*, 88 F.R.D. at 609; *Lewis*, 78 F.R.D. at 306-07.

[57] *Queen Uno Ltd. Partnership*, 183 F.R.D. at 693 ("[I]n a Rule 10b-5 action, damages are determined by the out-of-pocket rule. The out-of-pocket rule dictates that damages are determined between the stock purchase price and the true value of the stock at the date of purchase.").

[58] Defendants also cite to *Allison*, 151 F.3d at 425-26. However, *Allison* is an employment case necessarily involving individualized damages.

essentially requires that buyers' actual damages will likely exceed the damage cap by a ratio of 100 to 1 or more. It is simply impossible that the damage cap not be reached.

Defendants also suggest that individualized proof will defeat class certification because:

> [I]n order to determine individual claimants' entitlement to damages, they must each present proof of the price at which they purchased the stock, the particular nonpublic information they claim caused their inflated purchase price, the date on which it became public, and the stock price after it was disclosed. Each of these factors would have to be proven on a claimant-specific basis and could not be determined through a single arithmetic formula.

§20A Opp. at 10. This is just plain wrong. In fact, every securities class action claim process revolves around a single or small set of arithmetic formulas for determining damages and for calculating payouts based upon claimant's submission of proof demonstrating his purchase. These formulas approved by the judge in settlements, or by the jury, provide a clear and concise method for determining damages which has been repeatedly applied by claims administrators nationwide in securities cases. Defendants' attempt to make the claims process horribly complicated must fail.

4. There Are No "Irreconcilable Intra-Class Conflicts" that Would Bar §20A Class Certification

Defendants argue plaintiffs' proposed §20A class suffers from "fatal flaws" because it is riddled with irreconcilable intra-class conflicts. Plaintiffs suggest defendants' self-appointment as champion of the interests of class members should be taken with a grain of salt. *In re Oxford Health Plans, Inc. Sec. Litig.*, 199 F.R.D. 119, 125 (S.D.N.Y. 2001) (in the context of a defendants' opposition to class certification "defendants' expressed concerns [for class members] amount to crocodile tears").

Defendants' primary conflict argument is as follows:

> [T]he only goal that matters to any particular plaintiff is to maximize the stock inflation claim for a particular trading day, necessarily at the expense of claimants for the other days. Thus, to the extent that the class encompasses trades on more than one day, individual class members have diametrically opposed objectives that foreclose the propriety of class treatment.

§20A Opp. at 11. There simply is no basis for the suggestion that §20A plaintiffs have "diametrically opposed objectives." To the contrary, all §20A claimant have a common interest in establishing the predicate §10(b) violations of defendants.

Defendants' argument would again prove too much. If every securities claimant had an intractable conflict of interest with any other claimant who purchased on a different day, then no securities case with §20A or §10(b) claims could be certified. Finally, defendants' argument ignores the realities of how damages are litigated. It is the jury's role, based upon testimony of experts, to determine the amount of artificial inflation in the securities price during the class period. Using that information, the judgment is allocated among class members. Defendants' suggestion of "irreconcilable" conflicts rings hollow.

5. There Is No Difficulty in Preparing a Trial Plan for §20A Claims

Defendants argue "it is simply impossible to devise any method by which these inherently individualized claims could be tried on a class basis." §20A Opp. at 12. This argument is based upon their incorrect assumption that there would need to be a mini-trial for each of the 450 transactions made by defendants. At these mini-trials, defendants argue, the jury would be required to make determinations as to what material non-public information was available to each defendant when each trade was made with "more than 400 interrogatories" to establish liability and damages as to each trade, and with "each claimant appearing before the Court and presenting proof as to the circumstances of the individual stock purchases and sales." *Id.* at 13. This is simply nonsense.

Again, defendants' position rests upon its misquoting of this court's March 12, 2003 ruling that to state a §20A cause of action, the plaintiff must "(1) allege a requisite independent, predicate violation of the Exchange Act (or its rules and regulations), *e.g.*, §10(b), and (2) show that he has standing to sue under §20A because he 'contemporaneously with the purchase or sale of securities that is the subject of such violation has purchased ... or sold securities of the same class' as the

insider defendant." March 12, 2003 Order at 31-32. Hence, rather than 450 "mini-trials," the jury would be faced with an extremely easy set of questions for determining whether §20A was violated by a particular defendant:

1. Have plaintiffs proved that the defendants violated §10(b)?

2. Did plaintiffs trade within a set number of days after defendants traded?

As described above, once plaintiffs complete their showing of a §10(b) violation, the jury's task is extremely straightforward. As for claimants, a determination as to whether they traded contemporaneously with defendants is a matter that would be assigned to a claims administrator – the same administrator who will be resolving these issues for claimants' §10(b) claims.

Defendants cite to *O'Sullivan*, for the proposition that where a case may "'degenerate in practice into multiple lawsuits separately tried,'" class treatment is inappropriate. 319 F.3d at 744; §20A Opp. at 13. However, defendants simply misquote *O'Sullivan*. The full quote from *O'Sullivan* makes clear that its holding is limited to cases where individual ***calculations of damages predominate***:

> The extent (but not the nature) of Countrywide's participation in the transactions varies, making individualized calculations of damages predominate. Where the plaintiffs' damage claims "focus almost entirely on facts and issues specific to individuals rather than the class as a whole," *Allison*, 151 F.3d at 419, the potential exists that the class action may "degenerate in practice into multiple lawsuits separately tried," *Castano*, 84 F.3d at 745 n.19. In such cases, class certification is inappropriate.

319 F.3d at 744. In *O'Sullivan*, the court found these individual issues predominated, not because mere individual calculations would be required, but rather because the Texas statute required damages be based upon an individual inquiry into the facts of each individual's transaction with a

complex fact determination regarding what portion of each transaction created damages for plaintiffs.[59] As noted above, that situation simply does not exist here.

6. Even if Subclasses Were Required, There Would Be No Need for 224 Subclasses

Defendants argue that if this Court considers subclasses, it would need to have a subclass for every one of defendants' 224 transactions. As noted above, plaintiffs do not believe that there is any reason for any §20A subclasses – let alone 224.

This Court held that to establish a §20A violation plaintiffs need only prove that each defendant violated §10(b) and that plaintiffs contemporaneously traded with defendants. March 12, 2003 Order at 31. While plaintiffs admit that demonstrating this predicate §10(b) violation will require a lengthy and complex demonstration, once this is done, there really is very little additional proof that will be required to demonstrate the §20A claim. As noted above, there is no requirement that the class representative be in the exact position as the remainder of the class members only that the class representative's claims be "typical." *Endo*, 147 F.R.D. at 167 (where a purchaser of common stock sought to represent a class of purchasers of debentures and notes as well as common stocks, the court found that purchasers' claims were typical, regardless of the type of security

---

[59] Defendants' other citations are similarly unavailing. *Texaco*, as noted above, has been withdrawn by the Fifth Circuit on February 1, 2002. *Allison* denied class certification based upon its finding that "plaintiffs' claims ... focus almost entirely on facts and issues specific to individuals rather than the class as a whole: what kind of discrimination was each plaintiff subjected to; how did it affect each plaintiff emotionally and physically, at work and at home; what medical treatment did each plaintiff receive and at what expense; and so on and so on." 151 F.3d at 419. Similarly, *Patterson*, denied class certification based upon the predominance of individual issues of reliance – an issue not at issue in securities case where reliance is presumed. 241 F.3d at 419. Finally, *Castano* is distinguishable because plaintiffs proposed a class of all persons who were addicted to cigarettes since 1943, the class was difficult to identify and since no single case had been tried using those plaintiffs' theories of recovery, no one could estimate how to try the case on an individual basis, let alone on a class-wide basis. 84 F.3d at 748-52. These are clearly not applicable to plaintiffs' §20A claims.

purchased, because all of the claims arose out of the same allegations and omissions). *See also* citations at n.54. In such a circumstance, there is no justification for this radical increase in complexity as demanded by defendants.

Defendants' cited cases do not suggest a different conclusion. For example, *MicroStrategy* is not a class certification case and stands for exactly the opposite of defendants' position. In particular, in *MicroStrategy* the court refused to dismiss class action allegations against a defendant where plaintiff traded with that defendant on only one of several of defendants' trade days. 115 F. Supp. 2d at 663-64. Such a ruling clearly demonstrates that a plaintiff with standing to bring an action relating to one of defendant's trades would have standing to pursue all of defendants' trades in a class action case. Indeed, the only defendant dismissed in *MicroStrategy* was a defendant who shared no contemporaneous trades with any plaintiff.

Similarly, defendants cite *Feldman v. Motorola, Inc.*, No. 90 C 5887, 1994 U.S. Dist LEXIS 14809, at *4 n.2 (N.D. Ill. Oct. 14, 1994), and *Worlds of Wonder*, for the proposition that subclasses are required for each defendant's particular trade. Defendants imply that these cases ruled on this issue – ***they did not***. Rather, these two cases involve dicta about the possibility of certifying subclasses.[60] There is no indication that such events ever occurred in these cases. To the contrary,

---

[60] Defendants' other cited cases are similarly unavailing. For example, defendants cite to *Johnson v. Am. Credit Co.*, 581 F.2d 526, 532-33 (5th Cir. 1978), for the proposition that every "subclass would have to be represented by its own class representative." §20A Opp. at 15. However, nothing in *Johnson* suggests the need for subclasses in this case as *Johnson* notes that subclasses are only required "when appropriate" and suggests that any such classes are broad enough to cover anyone aggrieved by the same type of harm. 581 F.2d at 532. Similarly, defendants incorrectly cite to *Payne v. Travenol Labs, Inc.*, 673 F.2d 798, 812 (5th Cir. 1982), to imply that a subclass must be headed by a party with identical harm. However, *Payne* – an employment discrimination case – does not require identical harm merely that the class representative suffers the same type of harm as other plaintiffs. *Id.* Defendants' citation to *United States Surgical Corp. Sec. Litig. v. Hirsch*, No. 3:92cv374 (AHN), 1995 U.S. Dist. LEXIS 20895, at *73 (D. Conn. Apr. 12, 1995); *In re Cypress Semiconductors Sec. Litig.*, No. C-92-20048 RPA, 1994 WL 669856 (N.D. Cal. Nov. 29, 1994), and *In re Verifone Sec. Litig.*, 784 F. Supp. 1471, 1489 (N.D. Cal. 1992), *aff'd*, 11

there are several cases appointing §20A classes without any sub classing. *Picard Chem. Profit Sharing Plan v. Perrigo Co.*, No. 1:95-CV-141, 1996 U.S. Dist. LEXIS 16330, at *38 (W.D. Mich. Sept. 27, 1996); *Gerstein v. Micron Tech.*, No. 89-1262, 1993 U.S. Dist. LEXIS 21216, at *3 (D. Idaho Sept. 10, 1993); *In re Cendant Corp. Litig.*, 60 F. Supp. 2d 354, 360 (D.N.J. 1999).

There is no reason for this Court to impose §20A subclasses in this case.

7. Defendants' Back Door Attempt to Request Reconsideration of This Court's "Contemporaneous Trading" Decision Should Be Rejected

Defendants use the occasion of plaintiffs' class certification motion to improperly request this Court to reconsider and reverse its prior legal determinations regarding contemporaneous trading. §20A Opp. at 16. In particular, defendants ask this Court to reconsider the following holding:

> Persuaded by such reasoning, this Court finds that two or three days, certainly less than a week, constitute a reasonable period to measure the contemporaneity of a defendant's and a plaintiff's trades under §20A.

March 12, 2003 Order at 35. Defendants attempt to convince the Court to reconsider its decision so as to limit the class period to "within one day after a defendant sold his or her stock." §20A Opp. at 16. Plaintiffs request that this Court disregard defendants' argument on this issue.

To the extent the Court does consider the trading-window issue, plaintiffs note while there are several cases that have settled on a same-day window, there is a much larger body of case law supporting the proposition that the time period for "contemporaneous trading" lasts several days or longer. *See, e.g., Oxford Health*, 187 F.R.D. at 144 (five day gap); *In re Cypress Semiconductor Litig.*, 836 F. Supp. 711, 714 (N.D. Cal. 1993) (same); *In re Eng'g Animation Sec. Litig.*, 110 F.

F.3d 865 (9th Cir. 1993), are all inapplicable because they simply hold the uncontested fact that to bring a §20A claim requires contemporaneous trading. Absent a showing of the necessity of dividing the §20A class, these cases do nothing for defendants' argument as plaintiffs have already properly pled contemporaneous trading.

Supp. 2d 1183, 1196 (S.D. Iowa 2000) (three days); March 12, 2003 Order at 33 (listing cases).[61] Indeed, at least one court has held the standard can encompass defendants' entire scheme. In *In re Am. Bus. Computers Corp. Sec. Litig.*, MDL No. 913 (CLB), 1994 U.S. Dist. LEXIS 21467, at *11 (S.D.N.Y. Feb. 24, 1994), defendants traded over a period of several weeks and a pattern and conspiracy of insider trading had been established. The court held, "a class action may be maintained on behalf of all persons who purchased stock on an exchange during the period that defendants were selling that stock on the basis of insider information." *Id.*

Defendants assert that although "courts have strayed from a strict one-day rule ... there is no indication that any of these cases involved a heavily traded stock like the Enron shares at issue here." §20A Opp. at 18. There is no basis for the distinction that defendants propose. In particular, all of the cases cited by defendants involve widely traded securities. There simply can be no viable distinction for shortening the contemporaneous requirement merely because one stock trades four million shares a day as opposed to, for example, two million shares a day.

Defendants also argue failing to limit the contemporaneous requirement to one day "obviously threatens the insider with unlimited liability." §20A Opp. at 19. This argument is incorrect. Liability under §20A is expressly limited to "the profit gained or loss avoided in the transaction or transactions that are the subject of the violation." 15 U.S.C. §78t-1(b)(1). Hence, it is simply not true that a two or three day contemporaneity requirement will subject defendants to unlimited liability. Defendants themselves have admitted that Enron's average trading volume from

---

[61] *See, e.g., Froid v. Berner*, 649 F. Supp. 1418, 1421 n.2 (D.N.J. 1986) (holding nine days between trades "is unquestionably contemporaneous"); *Gerstein*, 1993 U.S. Dist. LEXIS 21214, at *20 (a "few days"); *In re Nord Res. Corp. Sec. Litig.*, No. C-3-90-380, 1992 U.S. Dist. LEXIS 22739, at *21 (S.D. Ohio Dec. 15, 1992) ("liability extends forward a few days from the date of an insider trade"); *In re Silicon Graphics Sec. Litig.*, 970 F. Supp. 746, 761 (N.D. Cal. 1997) (adopting six-day period).

October 19, 1998 through November 28, 2001 was 4,967,622 shares per day. §20A Opp. at 18 n.5. Since there are no allegations of stock sales of anywhere near this magnitude on any given day, defendants' request to limit the contemporaneity requirement to one day will not alter their liability in this case. There is no reason to alter the Court's prior decision regarding contemporaneity.

8. The §20A Class Representatives Are Adequate

In a last-ditch effort to stave off class certification, defendants argue the proposed representatives are inadequate. As demonstrated extensively above, each of the proposed class representatives are more than adequate. *See supra* §III. Certain statements made by the §20A defendants regarding six of the proposed representatives (notably defendants attack only those who traded contemporaneously with them) necessitate correction.

The Individual Defendants' attacks on Dr. Kimmerling are completely off base. Contrary to defendants' suggestions, Dr. Kimmerling displayed a great deal of knowledge regarding the case. *See supra* §III.B., discussing Dr. Kimmerling. *See also* Ex. 17 at 50 (noting that he has read an entire book on Enron). The defendants fault him for failing to recognize the names of several defendants. *See* §20A Opp. at 22. A failure to name several of the more than 90 defendants in this case in no way affects an adequacy determination. Outrageously, defendants somehow seek to imply that because Dr. Kimmerling is a doctor, he is an inappropriate representative. Defendants state: "In fact, Dr. Kimmerling is a physician ... who admits to having had a very limited investment history ... and lacks financial sophistication ...." §20A Opp. at 22. The fact that Dr. Kimmerling is a doctor in no way impacts his ability to be a class representative. The Individual Defendants also fault Dr. Kimmerling for testifying that he was not aware of "every detail" of the litigation. §20A Opp. at 23. Surely, however, there is no such requirement either under Fed. R. Civ. P. 23(a) or the PSLRA.

Defendants also attack Michael Henning. As demonstrated above Mr. Henning is a more than adequate class representative. *See supra* §III.B., discussing Mr. Henning's adequacy. The Individual Defendants fault Mr. Henning for failing to conduct an independent investigation into the facts or claims at issue. §20A Opp. at 23. Mr. Henning testified that he relied on his attorneys but also testified that he had read and followed the Enron story in the media. *See* Ex. 18 at 57. There is no requirement either under the federal rules or the PSLRA that requires a proposed class representative to don the role of a private investigator. Mr. Henning, like all the class representatives, is entitled to rely on his attorneys.

Defendants also attack Dr. Fitzhugh Mayo. As demonstrated above, Dr. Mayo is an ideal class representative. *See supra* §III.B., discussing Dr. Mayo. The Individual Defendants fault Dr. Mayo for not knowing the name of the judge; however, Dr. Mayo clearly testified that he has been monitoring the litigation. "[W]e are furnished information from the law firm on a regular basis as to what's going on with the – with the litigation." Ex. 24 at 93. He further testified that he reads as much information sent to him as he can absorb spending approximately three hours a week reading information regarding the case. *Id.* As was the case with Mr. Henning, the Individual Defendants fault Dr. Mayo for failing to personally investigate the allegations in the complaint. As noted above, this is not a requirement.

The Individual Defendants also question the adequacy of Joseph Speck. As detailed above, Mr. Speck is an ideal class representative. *See supra* §III.B., discussing Mr. Speck. As a retired CPA, he possesses a detailed understanding of the allegations in the complaint. *See* Ex. 20 at 76-77. He has also demonstrated that he is committed to being an active class representative and remaining knowledgeable about the case. *Id.* at 206. As with the other plaintiffs, the defendants seek to question Mr. Speck's adequacy because he has not conducted personal investigation into the claims asserted. But Mr. Speck easily satisfies the requirements of Fed. R. Civ. P. 23.

The Individual Defendants also claim Ben Schuette is an inadequate class representative. This is simply not the case. As noted above Mr. Schuette has demonstrated a detailed understanding of the allegations in the complaint and has committed to doing whatever is necessary during the course of the litigation to protect the interests of the absent class members. *See, e.g.*, Ex. 21 at 75. *See supra* §III.B., discussing Mr. Schuette. Defendants point to the fact that Mr. Schuette could not identify numerous defendants. Serving as the class representative, however, is not a memory test. Mr. Schuette's failure to name all of the more than 90 defendants in this action in no way affects his ability to properly represent the class.

Defendants attack Mr. Cassidy solely on the grounds that he "purports to bring claims as a trustee on behalf of a trust." §20A Opp. at 26. However, "a person's role as a trustee in and of itself does not preclude such person from being an adequate representative of a class." *Seiden v. Nicholson*, 69 F.R.D. 681, 689 (N.D. Ill. 1976); *Markewich v. Adikes*, 76 F.R.D. 68, 74 (E.D.N.Y. 1977); *Kane Assocs. v. Clifford*, 80 F.R.D. 402, 409 (E.D.N.Y. 1978); *see also Berger v. Compaq Computer Corp.*, No. H-98-1148, 2000 U.S. Dist. LEXIS 21424, at *18 (S.D. Tex. July 17, 2000), *vacated on other grounds*, 257 F.3d 475 (5th Cir. 2001).

Despite the above cases, defendants rely upon *McNamara v. Bre-X Minerals, Ltd.*, 256 F. Supp. 2d 549, 555 (E.D. Tex. 2002), for their broad conclusion that a trustee can never serve as a class representative. However, the holding in *McNamara* is easily distinguishable. First, the *McNamara* court expressly based its decision on the fact that the trustee "did not purchase or sell the stock, and he did not actively participate in the market transaction." *Id.* at 554. *McNamara* is therefore distinguishable because in this case Mr. Cassidy as trustee did in fact purchase Enron stock and actively participated in the market transaction. Ex. 23 at 69, 78, 82, 85, 95. Mr. Cassidy is an adequate class representative.

X. SUBCLASSES ARE UNNECESSARY

Defendants argue if the Court certifies a putative class, it must also certify one subclass for plaintiffs §10(b) claims, six separate subclasses for plaintiffs' §11 claims and an additional nine subclasses for plaintiffs §12(a)(2) claims. As a basis for this argument, defendants claim certification of a single class of plaintiffs will further complicate and delay the litigation. Financial Institutions' Opp. at 31. This argument is without merit. As defendants admit, the primary purpose of the class action device is judicial economy and expediency. *Allison*, 151 F.3d at 410 (5th Cir 1998); Financial Institutions' Opp. at 31. Defendants' proposal, however, ***would create at least 16 new subclasses*** – a unnecessary complication that would detract from judicial economy and expediency by creating a mass of different proceedings and parties, further slowing this already complex litigation.[62]

Courts in the Fifth Circuit have rejected arguments similar to those raised by defendants, and have certified single classes consisting of §§10(b), 11 and 12 claims. For example, in *LTV,* the court certified a class consisting of purchasers of nine types of securities claiming §§10, 11 and 12 violations. The court held that there was "substantial overlap of elements among the three claims." *LTV*, 88 F.R.D. at 146. In addition, the court found because there was a "common thread" of

---

[62] The case law the Financial Institutions cite in support of their argument is unpersuasive and distinguishable. Financial Institutions' Opp. at 30. For example, they cite *Chisholm v. Jindal*, No. 97-3274 Section K, 1998 U.S. Dist. LEXIS 2521, at *6 (E.D. La. Mar. 2, 1998), in which ***the court refused to divide the class into subclasses***. In *Marisol A. by Forbes v. Giuliani*, 126 F.3d 372, 378-79 (2d Cir. 1997), a class action involving the rights of abused and neglected orphan children, the court created subclasses of plaintiffs who had "separate and discrete legal claims pursuant to particular federal and state constitutional, statutory and regulatory obligations of the defendants." *Id.* at 378. In this case by contrast, proposed class members have alleged claims against defendants as a group. Finally, the Financial Institutions cite *Levine*, 1976 U.S. Dist. LEXIS 17277. This case is also readily distinguishable. In *Levine* the court did certify subclasses, but specifically stated that its holding "is mandated by the fact that the claims herein ***cannot possibly be construed to allege a 'common course of conduct'*** so as to justify the certification of one class." *Id.* at *7-*8. Here, of course, a common course of conduct is precisely what has been alleged.

misrepresentations and omissions that tied the case together, certification of a single class was proper. *Id.* at 141. Other courts have come to similar conclusions. *See Odmark v. Mesa Ltd. P'ship,* No. 3:91-CV-2376-X, 1992 U.S. Dist. LEXIS 16789, at *10, *22 (N.D. Tex. June 5, 1992), *aff'd*, 59 F.3d 1251 (5th Cir. 1995); *Levitin v. A Pea in the Pod*, No. 3:94-CV-0247-D, 1997 U.S. Dist. LEXIS 4985, at *5 (N.D. Tex. Mar. 31, 1997) (certifying a single class consisting of §§10(b) and 11 claims).

Defendants fail to demonstrate ***why*** subdivision of the class will increase judicial economy. Defendants say a single class will increase complexity and slow down the litigation. Defendants do not say that they want separate trials for each subclass, but if there is to be only one trial, there is no reason to divide the class. If defendants do intend to ask for multiple trials, it is inconceivable how separate trials for each of defendants' proposed subclasses (at least 16 in all) would increase judicial economy. It is obvious that judicial efficiency would be served by a single trial. A single class should be certified.

XI. STARO IS A PROPER REPRESENTATIVE

Staro seeks to represent all purchasers of Enron's Zero Coupon Convertible Senior Notes due 2021 ("Zero Coupon Notes" or the "Notes"). Staro has standing to assert the §11 claims on behalf of the purchasers of the Zero Coupon Notes, and has the same interests as other purchasers of the Zero Coupon Notes. Investment managers with full discretionary decision-making authority and authorization to act as an attorney-in-fact for their clients have standing to raise claims on behalf of their clients for the securities purchased. This Court should appoint Staro as a class representative for purchasers of the Zero Coupon Notes. In the alternative, Staro asks that the Court substitute the funds its manages as class representative for purchasers of the Notes.

Staro is a Wisconsin limited liability company. It is the investment manager or general partner for a number of related affiliates, including Stark Investments, L.P., Stark Trading, Reliant

Trading, Stark International, Shepherd Investments International, Ltd. and Shepherd Trading Limited, for whom it purchases securities and makes all investment decisions. Staro is a major institutional investor with $2 billion of funds under investment. The deposition testimony of Mr. Bobbs and the Declaration of Staro's General Counsel Colin Lancaster demonstrate Staro's adequacy. Alliance's attempt to discredit and misconstrue Mr. Bobbs' testimony must fail.

Staro initially sought to represent a class of bond investors in *Enron*. Accordingly, the certification signed on behalf of Staro by Colin Lancaster, attached to Staro's initial complaint states: "Plaintiff's transactions in the bond securities of Enron Corp. between and including December 21, 1998 through November 30, 2001 (the "Class Period") are listed on the attached pages." Ex. 39 (Certification), ¶5. The initial complaint filed with this Court stated Staro's claim as the following: "Plaintiff purchased, or acquired the economic interest and risk in, approximately $80 million in par value of Enron bonds during the Class Period and has been damaged thereby. Plaintiff estimates that its net losses on Enron bonds exceed $35 million." *Id.*, ¶8. The Court determined that the consolidated actions should have a single Lead Plaintiff. Both Lead Plaintiff's Motion for Class Certification and Amended Motion for Class Certification list Staro as proposed class representative for purchasers of the Zero Coupon Notes. *See* Lead Plaintiff's Motion for Class Certification at 22; Lead Plaintiff's Amended Motion for Class Certification at 23; ¶¶81(e), 1006, 1008.1.

A. Staro's Application and Statements in Support of Its Motion for Appointment as Lead Plaintiff Complied With Statutory Disclosure Requirements

In Staro's prior application for appointment as lead plaintiff, Staro provided to the Court all documentation and affidavits required by the PSLRA. The PSLRA sets forth the following requirements for parties seeking class representative or lead plaintiff status:

> Each plaintiff seeking to serve as a representative party on behalf of a class shall provide a sworn certification, which shall be personally signed by such plaintiff and filed with the complaint, that ...

* * *

> (iv) sets forth all of the transactions of the plaintiff in ***the security that is the subject of the complaint*** during the class period specified in the complaint; ...

15 U.S.C. § 78u-4(a)(2)(A).

Staro did not mislead the court. Staro sought remedy for bond investments only in its initial complaint. *See* Ex. 39, ¶1. The attached certification contained a schedule of all Staro's bond investments since that was "the security that is the subject of the complaint." *See Oxford Health*, 199 F.R.D. at 124 (finding no evidence of misleading the court because the named plaintiffs did not list options trades for which they did not base their claim). This Court acknowledged in its prior opinion in the case that "Staro highlights the fact that its loss is exclusively in debt securities." *Enron*, 206 F.R.D. at 449. Staro's General Counsel, Colin Lancaster, provided the declaration and certification to the Court on its behalf for compliance with the PSLRA. *See* Ex. 40. Alliance's insinuation that Staro did not comply with both the letter and spirit of the PSLRA is without basis.

Staro has never hid the fact that it engaged in derivative transactions or invested on behalf of its clients. The Declaration provides the background of Mr. Stark, one of the founders of Staro, and states his trading background which included authoring a book on hedging and arbitrage trading. The initial complaint further provides at paragraph nine the following: "As is stated in the Certification, some of the investments by Plaintiffs were made through share swap transactions." Ex. 39, ¶9. The Declaration is very explicit in that Staro acts as general partner or appointed investment manager and invests on behalf of its clients. *Id.*, ¶2. Thus, Staro has been forthright with the Court, unlike the named plaintiffs in the authorities cited by Alliance. *Cf. Savino v. Computer Credit*, 164 F.3d 81, 87 (2d Cir. 1998) (affirming denial of class certification where the named plaintiff gave inconsistent statements regarding whether he received the letter from defendant which was the basis of his claim against the defendant); *Smyth v. Carter*, 168 F.R.D. 28, 33-34 (W.D. Va. 1996) (finding named plaintiffs dishonest and irresponsible, court did not certify class).

B. Staro Has Standing to Sue the Defendants for Violations of §11

Staro has standing to bring a claim under §11 of the 1933 Act on behalf of purchasers of the Zero Coupon Notes. Although Staro purchased the Notes for the account of its related affiliates, Staro is a real party in interest to raise the claims for the purchasers of the Notes. Institutional investors and money managers should be included in the category of purchasers for securities since they often are the parties making the investment decisions. *Alfaro v. CapRock Communications Corp.*, No. 3:00-CV-1613-R, 2000 U.S. Dist. LEXIS 21743, at *7-*8 (N.D. Tex. Dec. 8, 2000). An investment manager who is an attorney in fact for its clients with unrestricted decision making authority is a purchaser under the federal securities laws with standing to sue in its own name. *Weinberg v. Atlas Air Worldwide Holdings, Inc.*, 216 F.R.D. 248, 255 (S.D.N.Y. 2003) (citing *Ezra Charitable Trust v. Rent-Way, Inc.*, 136 F. Supp. 2d 435, 442 (W.D. Pa. 2001)). In *Weinberg*, the court accepted as adequate evidence of the investment manager's standing to prosecute claims on behalf of its clients a signed affidavit by a named partner of the investment firm declaring that the investment firm was authorized "to bring suit for their investment losses." 216 F.R.D. at 255. Fund managers frequently bring suit on behalf of the funds they manage. *See, e.g., WorldCom*, Order at 7. ("HGK Asset Management, Inc. ... is a registered investment advisor and acts as a fiduciary to its union-sponsored pension and benefit plan clients [certified as Class Representative.]").

Similarly Colin Lancaster, Staro's general counsel, declared the following: "Staro has complete discretionary authority over the investment decisions of all of the funds that it manages. In addition, Staro has authority to bring suit on behalf of all of its affiliates and the funds it manages." *See* Ex. 39, ¶3. The Agreement of Limited Partnership of Stark Investments Limited Partnership, Article III – Section 3.1(g) states:

> Except as expressly provided otherwise herein, management and control of the Partnership shall be vested exclusively in the General partner, which shall have all rights and powers which may be possessed and exercised by a general partner under applicable law, including the full and exclusive authority to act for and bind the

> Partnership. Without limiting the foregoing, the General Partner is hereby authorized and empowered on behalf of and in the name of the Partnership:...
>
> * * *
>
> (g) to commence or defend any litigation involving the Partnership or the General Partner in its capacity as General Partner, to retain legal counsel in connection therewith, and to have the Partnership pay any and all liabilities and expenses, including attorneys' fees, incurred in connection therewith, and to settle or compromise claims by the Partnership against third parties and to compromise, settle or accept judgment with respect to claims against the Partnership.

Ex. 41 (Partnership Agreement) at 8.

The Agreement of Limited Partnership of Stark Investments Limited Partnership, Article IV – Section 11.3 states:

> Each Limited Partner hereby irrevocably constitutes and appoints each and every General Partner, with full power of substitution, his true and lawful attorney-in-fact, and empowers and authorizes such attorney, in the name, place and stead of such Limited Partner, to make, execute, sign, swear to, acknowledge and file in all necessary or appropriate places all documents relating to the Partnership and its activities.

Id. at 28.

Authorized with full discretion to make investment decisions and bring litigation on behalf of its limited partners, Staro is a real party in interest with standing to prosecute the §11 claims on behalf of purchasers of the Zero Coupon Notes. "The real party in interest is the one who under applicable substantive law, has the legal right which is sought to be enforced. *Lemanik v. McKinley Allsopp, Inc.*, 125 F.R.D. 602, 607 (S.D.N.Y. 1989); *see also* Fed. R. Civ. P. 17(a). "The test in all such cases is whether plaintiff has 'such right as to afford [defendant] the protection of *res judicata* when the suit is terminated.'" *Lemanik*, 125 F.R.D. at 607. Since Staro is authorized to sue on

behalf of the partnerships and related affiliates, this test has been met. Therefore, Staro has standing to assert the §11 claims for purchasers of the Zero Coupon Notes.[63]

Although Alliance continually fails to accept the certifications, transaction schedules and Mr. Bobbs' deposition testimony as sufficient proof of Staro's purchases of the Notes, this Court has found such evidence sufficient proof of purchase. *See, e.g., U.S. Liquids*, 2002 U.S. Dist. LEXIS 26713, at *5 (accepting sworn certifications, stock confirmations and deposition testimony as sufficient proof of purchases in a §11 action). Also, Staro does not rely on statistical probability to establish that it purchased the Notes pursuant to the Registration Statement because it is indisputable that Staro purchased the Notes in the offering. The Outside Directors accept the transaction schedules and Mr. Bobbs' deposition testimony as sufficient proof of purchases of the Zero Coupon Notes by Staro or its related entities. *See* Outside Directors' Mem. at 14 n.20.

Staro made direct purchases of Notes in addition to engaging in swap transactions. The schedule and accompanying legend provided to the Court clearly indicates traditional purchases and swap transactions. *See e.g.*, Ex. 42 (Staro's Schedule of Enron Securities Transactions). The fact that Staro engaged in either short sales of Enron equity securities or swap transactions involving the Notes does not negate the fact it made direct purchases of the registered Notes, for the account of its related affiliates.

---

[63] If the Court rejects case law permitting fund managers to bring suit on behalf of the funds they manage, then Staro requests that the Court grant leave to substitute Staro's related limited entities instead to serve as class representatives. The Outside Directors are agreeable to the substitution of the funds managed by Staro as class representatives. *See* Outside Directors' Mem. at 14 n.20.

C. Staro's Interests Are Aligned with All Other Purchasers of the Zero Coupon Notes

1. Motivations of Purchasers Are Irrelevant to Any Claim or Defense in the Instant §11 Action

Staro's claims are the same as the other investors who made their decision to purchase the Zero Coupon Notes based on the information provided in the Prospectus and Registration Statement. Staro's claims involve the same offerings by the Registration Statement for Notes, the same defendants, the same legal theories and the same factual allegations that give rise to other class members' §11 claims. *See WorldCom,* Order at 39.

Staro need prove only that the Notes' Prospectus contained materially false statements, and that it purchased such Notes pursuant to the Registration Statement and was damaged thereby. 15 U.S.C. §77k; *see also Herman & McLean v. Huddleston*, 459 U.S. 375, 381-82 (1983). Proving that the statements were false is a factual determination that each class member must prove to succeed on its §11 claims. In this respect, Staro and other class members have the same interests.

Cases cited by Alliance where the court found that the named plaintiffs' claims were atypical of the class because each had to prove individual reliance are inapposite. *See, e.g., Landry v. Price Waterhouse Chartered Accountants*, 123 F.R.D. 474, 475-76 (S.D.N.Y. 1989). Reliance is not a element of the claim that Staro must establish.

Staro's level of sophistication and its other investments are simply irrelevant. Alliance relies on cases that find an investor atypical because the sophisticated investors did not rely on the misstatements and omissions when making investment decisions. However, other authority recognize that particular trading strategies of the named plaintiff are irrelevant to the fact of whether the named plaintiff will represent the claims of the absent plaintiffs when presenting its claim. *See WorldCom*, Order at 59 (holding that investors who shorted on the security and lost money are a part of the class while those who shorted and broke even or profited are not a part of the class); *Fields v.*

Biomatrix, Inc., 198 F.R.D. 451, 461 (D.N.J. 2000) (holding that the fact that the named plaintiff engaged in some short sales does not render its claims atypical from other plaintiffs or subject it to a unique defense); *Randle v. SpecTran*, 129 F.R.D. 386, 391 (D. Mass. 1988) (stating that investment strategy is of little importance to suitability as a class representative) (citing *Kirby v. Cullinet Software, Inc.*, 116 F.R.D. 303, 308 (D. Mass. 1987)). As detailed in Mr. Bobbs' deposition, the investment strategy of Staro in Enron securities, including the Zero Coupon Notes, depended upon the information contained in the financial statements incorporated in the Registration Statement and other qualitative information regarding the type of business and transactions in which Enron was engaged. *See* Ex. 29 at 115-118; *Cf. Camden Asset Mgmt., L.P. v. Sunbeam Corp.*, No. 99-8275-CIV, 2001 U.S. Dist. LEXIS 11022, at *55 (S.D. Fla. July 3, 2001) (denying class certification for §10b claim because the named plaintiffs admitted that they did not rely on the statements in the offering memorandum). Hence, Staro bases its §11 claim on the fact that the Registration Statement for the Notes incorporated Enron's 1999 and 2000 financial statements, which were materially false. The remaining class members make the same claim on the same basis. Thus, there is no conflict between Staro and any other purchaser of the Notes.

2. Staro's Claim Is Typical of Those Class Members It Seeks to Represent

The argument that Staro's particular investment strategy renders its claim atypical of the class must be rejected. "'[W]here the public market of a quoted security is polluted by false information, or where price, supply and demand are distorted as a result of misleading omissions, all types of investors are injured.'" *Oxford Health*, 199 F.R.D. at 124. "'It can be stated without fear of gainsay that the roster of shareholders of every large, publicly traded corporation includes institutional investors, short-sellers, arbitragers, etc.'" *Danis v. USN Communications, Inc.*, 189 F.R.D. 391, 397 (N.D. Ill. 1999). The fact that a named plaintiff may have used somewhat distinctive buying strategies does not render him atypical with respect to a claim of overarching

misrepresentation. *Id.* As discussed by Mr. Bobbs in his deposition testimony, regardless of the investment method or action taken, Staro investment decisions began with review of Enron's 1999 and 2000 financial statements. Like other investors, Staro was defrauded because of the fraudulent scheme employed by the defendants and the misleading statements and omissions in Enron's financial statements.

3. Trading Late in the Class Period Has No Bearing on This Motion

Whether Staro traded on the Zero Coupon Notes until the end of the period is irrelevant because it still suffered losses on the Notes, even if the later trades are excluded. This motion involves the issue of whether the class should be certified. The extent of damages suffered by Staro is an issue to be decided at trial and not relevant to this motion for class certification.

Alliance cites to *Kovaleff v. Piano*, 142 F.R.D. 406 (S.D.N.Y 1992), for the proposition that class representatives who purchase securities after the filing of suits are atypical of the class. However, other courts have disagreed with this proposition. *See, e.g., In re Scimed Sec. Litig.*, No. 3-91-575, 1993 WL 616692, at *5 (D. Minn. Sept. 19, 1993) (holding that post-class period purchases do not destroy typicality or adequacy of class representatives; *Fry v. UAL Corp.*, 136 F.R.D. 626, 632 (N.D. Ill. 1991) (holding that plaintiff's claim is not atypical because he purchased after the proposed class period to reduce his loss exposure). The court in *Kronfeld v. Trans World Airlines, Inc.*, 104 F.R.D. 50, 53 n.4 (S.D.N.Y. 1984), also noted that purchases of additional shares after disclosures does not render a named plaintiff atypical because it is common for investors to decrease the average cost of investment by purchasing additional shares at a reduced price. Decreasing the cost of the total investment in Enron is exactly what Staro did by trading in Enron securities after the restatements dated November 8, 2001. *See* Ex. 29 at 119-124. Hence, Staro's trades in the Notes after November 8, 2001 should not render it atypical. *See also* discussion regarding timing of purchases *supra* §IV.B.2.

The majority of authorities relied upon by Alliance holding that plaintiffs who engaged in transactions after curative statements are atypical from the class are almost exclusively involving §10(b) claims, unlike §11 claims, which have no reliance element. Alliance refers to this Court's basis for holding that Florida State Board of Administration ("FSBA") was inappropriate to serve as lead plaintiff in this securities litigation. Although this Court found FSBA atypical of the class because of post-disclosure trading, this Court also stated several other bases for finding FSBA inappropriate as a lead plaintiff. Particularly, "[i]n good conscience this Court cannot endanger this litigation by ignoring the issues created by FSBA's unique involvement with Enron." *Enron*, 206 F.R.D. at 456. There is no conflict of interest between Staro and the investors it seeks to represent because of any unique relationship with Enron. Also, since the class period ends November 27, 2001, and market records indicate that other investors invested in the Notes after the November 8, 2001 earnings restatement, Staro's claim is typical of the claims of the purchasers it seeks to represent.

4. Staro Meets the Adequacy Requirement

Mr. Bobbs' deposition testimony as detailed above demonstrates that Staro is knowledgeable about the litigation and actively managing the litigation. *See supra* §III.B. According to the Declaration of Colin Lancaster, General Counsel for Staro, the principals and in-house counsel will supervise the litigation. *See* Ex. 40, ¶4.

Contrary to the defendants' assertion , courts recognize that complete and perfect knowledge of pending litigation is not required of plaintiffs to meet the adequacy requirements of Rule 23. *Rubenstein*, 162 F.R.D. at 538-39. As Mr. Bobbs' deposition testimony exemplifies, Staro knows the nature of its claims and Staro's in-house counsel and principals are managing the litigation sufficient for appointment as class representative. Hence, Staro is an adequate representative.

XII. PUTATIVE CLASS MEMBERS' OBJECTION IS NO LONGER EXTANT

In a partial objection to Lead Plaintiff's class certification motion, certain purchasers of Osprey Notes (the "Osprey Note Purchasers") have expressed the view that while they have relied on the *Newby* action "to protect their interests with respect to their Enron Corp. securities claims," they have not relied on the *Newby* action and indeed have filed a separate state court action regarding their purchases of Osprey Notes. *See* Partial Objection by Putative Class Members to Lead Plaintiff's Amended Motion for Class Certification and Memorandum of Law Thereon at 1. They propose that if the class is certified, they should be allowed to opt out their Osprey purchases while otherwise participating in the *Newby* class with respect to any Enron-issued securities.

Lead Counsel has conferred with counsel for the Osprey Note Purchasers and agreed with the alternative proposed. This alternative appears to be a fair and efficient solution. When the time comes, the class notice will be drafted to allow persons like the Osprey Note Purchasers who brought separate state court actions which are not class actions to opt out of certain claims. This is within the Court's discretion. *See* Fed. R. Civ. P. 23(d).

XIII. CONCLUSION

For the reasons stated above, Lead Plaintiff requests that the Court grant the amended motion for class certification and certify the plaintiffs as class representatives.

DATED: November 24, 2003

Respectfully submitted,

MILBERG WEISS BERSHAD
HYNES & LERACH LLP
WILLIAM S. LERACH
DARREN J. ROBBINS
HELEN J. HODGES
BYRON S. GEORGIOU
JAMES I. JACONETTE
MICHELLE M. CICCARELLI
JAMES R. HAIL
ANNE L. BOX
JOHN A. LOWTHER
ALEXANDRA S. BERNAY
MATTHEW P. SIBEN
ROBERT R. HENSSLER, JR.

HELEN J. HODGES (by permission)

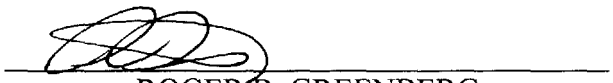
401 B Street, Suite 1700
San Diego, CA 92101
Telephone: 619/231-1058

MILBERG WEISS BERSHAD
HYNES & LERACH LLP
G. PAUL HOWES
JERRILYN HARDAWAY
Texas Bar No. 00788770
Federal I.D. No. 30964
1111 Bagby, Suite 4850
Houston, TX 77002
Telephone: 713/571-0911

MILBERG WEISS BERSHAD
HYNES & LERACH LLP
STEVEN G. SCHULMAN
One Pennsylvania Plaza
New York, NY 10119
Telephone: 212/594-5300

Lead Counsel for Plaintiffs

SCHWARTZ, JUNELL, GREENBERG
& OATHOUT, LLP
ROGER B. GREENBERG
State Bar No. 08390000
Federal I.D. No. 3932



ROGER B. GREENBERG

Two Houston Center
909 Fannin, Suite 2000
Houston, TX 77010
Telephone: 713/752-0017

HOEFFNER & BILEK, LLP
THOMAS E. BILEK
Federal Bar No. 9338
State Bar No. 02313525
440 Louisiana, Suite 720
Houston, TX 77002
Telephone: 713/227-7720

Attorneys in Charge

BERGER & MONTAGUE, P.C.
SHERRIE R. SAVETT
1622 Locust Street
Philadelphia, PA 19103
Telephone: 215/875-3000

Attorneys for Staro Asset Management

WOLF POPPER LLP
ROBERT C. FINKEL
845 Third Avenue
New York, NY 10022
Telephone: 212/759-4600

SHAPIRO HABER & URMY LLP
THOMAS G. SHAPIRO
75 State Street
Boston, MA 02109
Telephone: 617/439-3939

Attorneys for Nathaniel Pulsifer

SCOTT + SCOTT, LLC
DAVID R. SCOTT
NEIL ROTHSTEIN
S. EDWARD SARSKAS
108 Norwich Avenue
Colchester, CT 06415
Telephone: 860/537-3818

Attorneys for the Archdiocese of Milwaukee Supporting Fund, Inc.

LAW OFFICES OF JONATHAN D. McCUE
JONATHAN D. McCUE
4299 Avati Drive
San Diego, CA 92117
Telephone: 858/272-0454

Attorneys for Imperial County Board of Retirement

CUNEO WALDMAN & GILBERT, LLP
JONATHAN W. CUNEO
MICHAEL G. LENETT
317 Massachusetts Avenue, N.E.
Suite 300
Washington, D.C. 20002
Telephone: 202/789-3960

Washington Counsel

S:\PleadingsSD\Enron\Class Cert Reply\various defs opp.doc

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LEAD PLAINTIFF'S REPLY MEMORANDUM IN RESPONSE TO VARIOUS DEFENDANTS' OPPOSITIONS TO CLASS CERTIFICATION document has been served by sending a copy via electronic mail to serve@ESL3624.com on this November 24, 2003.

I further certify that a copy of the foregoing LEAD PLAINTIFF'S REPLY MEMORANDUM IN RESPONSE TO VARIOUS DEFENDANTS' OPPOSITIONS TO CLASS CERTIFICATION document has been served via overnight mail on the following parties, who do not accept service by electronic mail on this November 24, 2003.

Carolyn S. Schwartz
United States Trustee, Region 2
33 Whitehall Street, 21st Floor
New York, NY 10004